BANTU ADMINISTRATION
AND DEVELOPMENT
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VERSLAE

REPORTS

OF THE

BANTU APPEAL COURTS

1967

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NORTH-EASTERN BANTU APPEAL COURT.

MASUKU vs. NDWANDWE.

B.A.C. CASE No. 61 OF 1966.

ESHOWE: 24th January, 1967. Before Yates, President, Craig and Colenbrander, Members of the Court.

PROCEDURE.

Interpleader proceedings—when competent—payment of fee.

Summary: Interpleader proceedings were instituted by some unidentified person after completion of execution by the Messenger of Court, i.e. after cattle had been duly attached and handed over to the person entitled to them in terms of the Court's judgment in the main action. The Court purported to declare the cattle not executable and made no order as to who should pay the fees due.

Held: That as execution had been completed interpleader proceedings were void *ab origine*.

Held: That in interpleader proceedings the Court must make an order regarding the payments of fees *vide* Bantu Affairs Commissioners' Courts Rule 70 (5) (*b*).

Cases referred to:

Mazibuko vs. Mazibuko, 1 N.A.C. (N.E.D.) 157 (1950) (Warner 397).

Nkosi vs. Nsele, 1963, N.A.C. 56.

Rules referred to:

Bantu Affairs Commissioners' Courts, 65 (4) and (5), 70.

Appeal from the Court of the Bantu Affairs Commissioner, Hlabisa at Mtubatuba.

Craig, Permanent Member:

This is an appeal from a judgment of "Cattle are declared not executable with costs" in what purported to be an "interpleader" action.

The first notice of appeal lodged by Appellant (Judgment Creditor) personally was long and argumentative and could have been condensed into a submission that the judgment was against the evidence and the weight of evidence. His attorney subsequently and duly lodged applications to amend the surnames of certain persons and to add two new grounds of appeal. The amendment of the surnames was allowed with the consent of Respondent and the addition of one ground of appeal which dealt with the merits of the case was allowed. These matters dealt with in this paragraph will not be recorded herein as they did not affect the appeal.

Appellant's attorney sought to add the following ground of appeal, viz.—

"In any event as the cattle were handed over to the judgment creditor at the time of the attachment by the Messenger of the Court, the institution of Interpleader proceedings was not competent".

The application was refused as this objection should have been taken in the court below. *Mazibuko vs. Mazibuko*, 1, N.A.C. (N.E.D.) 157 (1950) (Warner 397). Nevertheless, this legal point was raised *mero motu* by this Court.

It is clear from the Messenger's return of service in respect of the warrant of execution concerned that the cattle which form the subject of the instant action were attached and handed over to the judgment creditor. The execution was thus completed in all its phases without there having been invocation of Bantu Affairs Commissioners' Courts Rule 65 (4) and (5) and the Messenger of Court became *functus officio*. That being so there could be no invocation of Rule 70. The Messenger of the Court in a case such as this is the only person who could initiate interpleader proceedings and then only if the property attached were in his possession, physical or otherwise. At the risk of being regarded as didactic I repeat that when execution has been completed in all its phases interpleader proceedings are no longer competent.

A study of the rules referred to above and the case of *Nkosi vs. Nsele*, 1963, N.A.C. 56 by all concerned would be beneficial and would obviate the wastage of money by illiterate litigants.

The attention of the Bantu Affairs Commissioner is drawn to the provision of Rule 70 (5) (*b*) whereby he is required, when delivering judgment in interpleader proceedings, to direct which party shall pay the fee. In this instance the summons was not stamped.

It is open to the "claimant" in this case to bring a vindicatory action by way of the ordinary summons B.A. 138 to recover cattle which he alleges to be his.

The so-called interpleader proceedings are void *ab origine* and must be set aside with costs.

Yates, President, and Colenbrander, Member, concurred.

For Appellant: Mr. W. E. White, Eshowe.

For Respondent: In person.

NORTH-EASTERN BANTU APPEAL COURT.

NDUNA THUSI vs. PAULOS THUSI.

B.A.C. CASE No. 67 OF 1966.

ESHOWE: 24th January, 1967. Before Yates, President, Craig and Colenbrander, Members of the Court.

PROCEDURE.

Plea failure to disclose defence-Bantu Affairs Commissioners' Courts Rule 45.

Summary: Plaintiff sued Defendant for certain six head of cattle, his property. Defendant pleaded a simple denial that he had taken the cattle but then proceeded to lead evidence to establish that he was the owner of the cattle and that Plaintiff had them on loan and in the course of proceedings admitted that he had taken certain of the cattle concerned.

Held: That the non-disclosure of a defence was an irregularity which affected the admissibility of most of Defendant's evidence.

Cases referred to:

Ngoma vs. Kumalo, 1941, N.A.C. (N. & T.) 35.

Rules referred to:

Bantu Affairs Commissioners' Courts, 45.

Works referred to:

The Civil Practice of the Magistrates' Courts in South Africa, 6th edition, by Jones & Buckle.

Appeal from the Court of the Bantu Affairs Commissioner, Nkandla.

Craig, Permanent Member:

Plaintiff (now Appellant) sued Defendant (now Respondent), his brother, in the Bantu Affairs Commissioner's Court for the return of six head of cattle allegedly his property and which Defendant had transferred to his own name.

Defendant pleaded a simple denial and, after hearing, the Commissioner entered judgment for Defendant with costs.

An appeal to this Court was noted on the ground that the Commissioner's judgment is against the evidence and the weight of evidence.

Mr. W. E. White, for Appellant, argued at the outset that the manner in which the summons was framed and the fact that no alternative value of the cattle was claimed suggested that the action was spoliatory and that as it was common cause that Defendant had taken cattle which were in Plaintiff's possession he should be ordered to return them. This Court did not accept that contention as it is clear that Plaintiff based his claim on ownership and the action is thus vindicatory. Mr. White then argued that the judgment should have been one of absolution as Defendant at no time indicated that he intended to lead evidence regarding a loan for lobolo purposes.

In reply the Respondent (Defendant) stated he had no objection to an absolution judgment as Plaintiff is his brother and is of unsound mind.

The Commissioner did not render much assistance to these unrepresented parties in presenting their cases [*Ngoma vs. Kumalo*, 1941, N.A.C. (N. & T.) 35]. Apart from Plaintiff's bare statement that his later father Mxosheni " had eight head of cattle of mine in his possession " no effort was made to establish his ownership in the light of his allegation in the summons that " he bought them through his earnings ". The only direct evidence as to the ownership of the cattle in question by Plaintiff's wife, Doreen, is contained in the last sentence of her evidence where she is on record as saying " The Defendant took the cattle of Defendant (presumably this should read Plaintiff) while he was well ". Her knowledge of ownership was not probed.

There was a presumption in favour of Plaintiff who was deprived of possession and the onus was on Defendant to rebut it.

Defendant admitted taking three head of cattle only and in this his mother Nomacakwa Thusi supported him. There is nothing on record, however, to indicate that the latter was present when the actual taking occurred. The Commissioner's reason for finding that Defendant admitted taking four head of cattle eludes me. Defendant's contention that the cattle he took were the property of his late father, whose heir he apparently is, is strongly supported by his mother and the apparently disinterested Phoshoza Thusi.

But there is a serious irregularity in the pleadings in that in his plea the Defendant did not disclose his defence *vide* Bantu Affairs Commissioners' Courts Rule 45 (3) which is peremptory. Defendant did not disclose that he would lead evidence to show that the ownership of the cattle vested, in fact, in him as heir to the late father of the parties and that Plaintiff had them on loan. Defendant cannot shelter behind the permissive provisions of sub-rule (5) of that rule *supra vide* "The Civil Practice of the Magistrates' Courts in S.A.", 6th edition, pages 518 *et sqq.* by Jones and Buckle. That being so the admissibility of Defendant's evidence regarding the loan of lobolo cattle is highly questionable.

Thus, at the outset, Plaintiff was not aware of the defence he had to meet. He gave no evidence regarding the loan to him of lobolo cattle and was not cross-examined by Defendant on the point. While it is not expected of an illiterate party to a case that he should be aware of the niceties of cross-examination it could reasonably have been expected that Defendant would have put to the Plaintiff the point that he did not own the cattle concerned but that they were in his possession on loan for lobolo purposes.

The irregularity could, possibly, have been offset by giving Plaintiff the opportunity to lead evidence in rebuttal.

Plaintiff's evidence was not convincing. He made no effort whatever to establish the allegation that the cattle concerned were derived from his own earnings. His failure to do so served to dissipate to some extent the value of the presumption in his favour.

In these circumstances it is my view that the only appropriate judgment was one of absolution and that the appeal should be allowed with costs and the Commissioner's judgment altered to "Defendant is absolved from the instance with costs".

Yates, President, and Colenbrander, Member, concurred.

For Appellant: W. E. White, Eshowe.

For Respondent: In person.

NORTH-EASTERN BANTU APPEAL COURT.

MVOTI MADHLALA vs. NOMADLULA MANANA.

B.A.C. CASE No. 2 OF 1967.

PIETERMARITZBURG: 30th March,, 1967. Before Yates, President, Craig and Reibeling, Members of the Court.

BANTU LAW.

PROCEDURE.

Isondlo—nature—prematurity of action—failure to comply with rules of Court—unhelpful reasons for judgment—best evidence rule—system of law not recorded.

Summary: The reader is referred to the full report below.

Cases referred to:

Bulunga vs. Bulunga, 1960, N.A.C. 1.

Kumalo vs. Dhladhla, 1956, N.A.C. (N.E.) 3.

Cele vs. Cele, 1947, N.A.C. (N. & T.) 3.

Mbata vs. Zungu, 1949, N.A.C. (N.E.) 72.

Xakaza vs. Zondi, 1961, N.A.C. 1.

Rules referred to:

Bantu Affairs Commissioners' Courts, 45.

Bantu Appeal Courts, 9.

Works referred to:

Principles of Native Law and the Natal Code by Stafford & Franklin.

A Digest of S.A. Native Civil Case Law by H. W. Warner.

Appeal from the Court of the Bantu Affairs Commissioner, Estcourt.

Craig, Permanent Member:

In the Bantu Affairs Commissioner's Court Plaintiff (now Appellant) sued Defendant (now Respondent) for three head of cattle or their reasonable value of R30 as " isondlo " in respect of the three children of a customary union, subsequently dissolved, entered into between Plaintiff's daughter Gladys and Defendant, which children live with and are supported by Plaintiff. It was alleged that on dissolution of the union the custody was awarded to Gladys until they reach the age of 14 years and that Defendant has failed to pay anything towards the maintenance of these children.

Defendant's plea (so called) to the claim was—

> " Defendant prays for order of court for the return of children and payment into court of the usual value of a beast according to Bantu Law and Custom ".

The Bantu Affairs Commissioner's judgment, which was undated, reads as follows:—

> " Judgment for Plaintiff. To pay R90 or three head of cattle and costs ".

Appeal to this court was noted on the following grounds:—

(1) That the Bantu Affairs Commissioner erred in awarding judgment against the Appellant in the sum of R90 plus costs.

(2) That the evidence adduced in this action did not warrant the Bantu Affairs Commissioner to make an award of R90 as Isondlo fees for the three children, that the amount awarded was excessive against the period of Appellant's children being in the custody of the Plaintiff.

(3) That at any event, the Plaintiff's claim is premature.

(4) At the Divorce trial, Appellant was awarded the custody of the children and no arrangements for payment of maintenance was ever discussed between Plaintiff and Defendant.

Mr. W. O. H. Menge, for Appellant, elected to rely on grounds 3 and 4, though he did not abandon the other grounds.

The pleadings and proceedings in this case are open to serious criticism and it is obvious that the Commissioner concerned is unfamiliar with the Rules for Bantu Affairs Commissioners' Courts

vide Government Notice No. 2886 of 1951, as amended, and those for Bantu Appeal Courts *vide* Government Notice No. 2887 of 1951, as amended, and the decisions of the Bantu Appeal Courts which are summarised in Warner's "A Digest of S.A. Native Civil Case Law" and the supplement thereto.

While it appears obvious that the instant case was tried under Bantu Law attention is directed, nevertheless, to paragraph 4217 of Warner's "Digest" in regard to a Commissioner's duty to record which system of law he has applied in the trial of a case.

No plea in terms of the provisions of Commissioners' Courts Rule 45 was lodged. The Commissioner did not explain in his so-called "Reasons for Judgment" what defence as required by Rule 45 (3) he extracted from the so-called plea lodged by Defendant. The wording of this latter document is what one would expect to find, *inter alia* in a counterclaim for custody of the children concerned. He did not invoke, as he should have done, the provisions of Rule 45 (11). He has a duty *vide Bulunga vs. Bulunga,* 1960, N.A.C. 1 to assist unrepresented Bantu litigants (see also paragraphs 4207-4208 of Warner's "Digest").

The Commissioner's "Reasons for Judgment" which also were undated, were of no assistance to this court as they should have been. They consisted of one sentence which merely stated the obvious and did not touch on, *inter alia,* the grounds of appeal. He would be well advised to familiarise himself with Bantu Appeal Courts Rule 9 and the full decisions of the cases summarised by Warner in his "Digest" at paragraphs 467-468.

The best evidence rule in respect of the decree of dissolution of the customary union concerned and its supplementary orders was ignored by the Commissioner and the record thereof was not placed before the court despite the fact that Defendant asked that it be done. This was a serious omission. It is possible that an order for maintenance was made in terms of section 83 (*b*) of the Natal Code and, even if not, that Plaintiff has a remedy as suggested in *Kumalo vs. Dhladhla* d.a. 1956 N.A.C. (N.E.) 3.

Sight should not be lost of the decision in *Cele vs. Cele,* 1947, N.A.C. (N. & T.) in which it is stated at page 3 that ". . . isondhlo is pure Native Law and Custom . . . it is not payment for moneys, etc. disbursed but a gift and a reward for the successful rearing of wards". The whole judgment is instructive.

Vide Ground 2 of appeal the period of maintenance is irrelevant —*Mbata vs. Zungu,* 1949, N.A.C. (N.E.) 72.

Vide Ground 3 of appeal and in the light of the decision in *Xakaza vs. Zondi,* 1961, N.A.C. 1 the instant action is premature. There is nothing on record regarding the age of the children who, if the evidence is to be believed, must go to the Defendant when they reach the age of 14 years.

All concerned in this case in the court *a quo* would benefit from a study of "Principles of Native Law and the Natal Code" by Stafford and Franklin, pages 281 *et seqq.*

As it is possible that Plaintiff may, in due course, have a claim *vide* Kumalo's case, *supra,* it is my view that the appeal should be allowed with costs, the Bantu Affairs Commissioner's judgment set aside and for it substituted one absolving Defendant from the instance with costs.

Yates, President and Reibeling, Member, concurred.

For Appellant: Adv. W. O. H. Menge i.b. L. A. Tod & Co., Pietermaritzburg.

For Respondent: In default.

NORTH-EASTERN BANTU APPEAL COURT.

SIFO DHLAMINI vs. MFESI DHLAMINI.

B.A.C. CASE No. 10 OF 1967.

ESHOWE: 25th January, 1967. Before Yates, President, Craig and Colenbrander, Members of the Court. Judgment delivered at Pretoria by Yates, President, on 15th February, 1967.

BANTU LAW.

House property—inter-house debts—affiliation of houses—Isidwaba (skin skirt) not house property—heirs liability for debts—payment of lobolo not an essential of a customary union.

Summary: Plaintiff of the "indhlunkulu" sued his half brother in another house for ten head of cattle advanced to provide lobolo for the latter's mother. It transpired that four emanated from Plaintiff's house, five from a minor house affiliated to that of Plaintiff of which the second generation heir was allegedly illegitimate as Plaintiff alleged that no lobolo had been paid for his mother by the first generation legitimate heir and one arose from a debt created by the loan of Plaintiff's mother's skin skirt (isidwaba) to the guardian of Defendant's mother. Defendant opposed on the ground that he had inherited nothing in his "house" from their common father and was, accordingly, not liable.

Held: That Plaintiff was not entitled to claim as his property the cattle which emanated from the affiliated minor house as there was a male heir therein.

Held: That the payment of lobolo is not an essential to a customary union.

Held: That a skin skirt (isidwaba) is personal property and cannot be the subject of a inter-house debt.

Held: That Defendant had inherited the lobolo rights in his sisters.

Cases referred to:

Ngcobo vs. Mkize, 1 N.A.C. 249 (N.E.).

Laws referred to:

Natal Bantu Code, section 59.

Appeal from the Court of the Bantu Affairs Commissioner, Eshowe.

Craig, Permanent Member:

In a Chief's Court Plaintiff (now Appellant and cross-Respondent) claimed ten head of cattle from Defendant (now Respondent and cross-Appellant), his half brother in a different house, allegedly an advance from Plaintiff's house property (indhlunkulu) to provide lobolo for Defendant's late mother Nomgqibelo. Defendant denied liability and the Chief gave judgment of "For Plaintiff all the claims must be returned and paid in full nine head of cattle with one beast for kaross isidwaba with costs R3.

On appeal the Bantu Affairs Commissioner entered judgment of "The appeal is upheld and the Chief's judgment is altered to read 'For Plaintiff for four head of cattle or their equivalent of R10 each, with costs'. Plaintiff to pay costs in this appeal action".

Appeal to this Court was noted by Plaintiff and the grounds, after amendments were allowed are as follows:—

(1) The learned Presiding Officer erred in varying or altering the judgment of the Chief's Court from ten head of cattle to four head as such judgment was against the weight of evidence and evidence.

(2) That the learned Bantu Affairs Commissioner erred in his findings that Boyi is the heir to the house of Mayiwase (affiliated to the Indlunkulu), in that it is on record that Malumbo, Boyi's father was not legally married to Boyi's mother and the other woman, and more particularly in that the maternal uncle of Defendant/Respondent retained the cattle of Boyi's one sister, and the Court should have further held that the retention by Boyi of the lobolo of his other sister did not, after the death of Malumbo, convert the relationship between Boyi's mother and Malumbo into a valid customary union.

(3) That the learned Bantu Affairs Commissioner erred in finding that Plaintiff had no property rights over the affiliated house of Mayiwase, in that, Malumbo, being dead, the heir of the said house, and property rights therein are vested with the Plaintiff as heir of the Indlunkulu.

(4) That on the Defendant's/Respondent's admission that—

(i) three head of lobolo cattle were delivered to his mother before the marriage was celebrated and that five head were paid to him on the day of marriage as lobolo for Sitopi (Esther);

(ii) Defendant/Respondent consented to the union between Sitopi (Esther) and Ngcobo;

(iii) Defendant/Respondent is entitled to a further three head of cattle frim Mbutshulwa Ngcobo;

the learned Bantu Affairs Commissioner should have held that Defendant/Respondent is liable to pay house debts to the extent of ten head of cattle.

(5) The learned Bantu Affairs Commissioner erred in his finding that the transaction in regard to the Isidwaba beast was not an inter-house transaction and should have held that the beast borrowed from Plaintiff's/Appellant's mother was house property and that its use in the circumstances, benefited the house of Defendant's/Respondent's mother, thus creating an inter-house debt.

A cross-appeal by Defendant was noted on the following grounds:—

"The judgment is against the evidence and the weight of the evidence in that:

(*a*) The Plaintiff failed to prove the alleged loan and any terms or conditions thereof and no evidence was adduced to the effect that such a loan had been made or announced in customary manner.

(*b*) In view of the long delay the Plaintiff's evidence was not sufficiently corroborated.

(*c*) The evidence established that the Defendant has not inherited anything from the Estate of his late father and he is accordingly not liable for any of his debts.

(*d*) The evidence generally was insufficient to justify such a judgment in favour of the Plaintiff."

At the first hearing af this case Plaintiff amplified his claim as follows:—

"The Plaintiff's claim is for ten head of cattle of which nine represent cattle belonging to the house of Plaintiff's mother which were used by the father of the parties to lobolo Defendant's mother such constituting a refundable loan to Plaintiff's mother's house from Defendant's mother's house the parties being the heirs in their respective houses and the Defendant having had full sisters who have since married and whose lobolo has been received by Defendant. The tenth beast represents the agreed value of a certain Isidwaba (kaross) delivered by the father of the parties to the Defendant's mother and refundable by Defendant's house."

Defendant then pleaded in amplification—

"that he has no knowledge of the alleged loan and puts Plaintiff to the proof thereof. Defendant further denies that he inherited anything from his late father and denies he received any lobolo in respect of any sisters of his."

The matter then proceeded to trial and judgment.

This Court, despite capable arguments by Messrs. F. Sithole and W. E. White who appeared for Appellant/Plaintiff and Cross-Appellant/Defendant respectively, was not persuaded that the Commissioner erred in the final conclusion arrived at by him.

He saw and heard Plaintiff and his witness to the effect that certain cattle pertaining to the house of the former were utilised by the father of the parties to lobolo Defendant's mother Nongbabela. In the absence of an announcement to the contrary this established Defendant's house as a debtor to Plaintiff's. He was not shown to have been wrong in accepting their evidence and coming to the conclusion that that fact was established and that only four head from Plaintiff's house were advanced for lobolo purposes.

Plaintiff sought to show that though another five claimed by him emanated from the lobolo of the progeny of the marriage between his late father and a woman Mayiwase, who was affiliated to the indhlunkulu their ownership vested in him. The five had been given as lobolo for Mayiwase's two daughters Dayi and Ngipani.

Plaintiff's attitude is untenable for reasons which follow.

Besides the two daughters Mayiwase had a son Mulambo who was heir to her house. According to Plaintiff this deceased son, during his lifetime lived with two women as wives without marrying either of them and had a son Boyi, who is still alive, and two daughters. His contention is that as Boyi is illegitimate he is not the heir, through his father Mulambo, of Mayiwase's house and that the five head of cattle concerned accrued to his house and were claimable by him from Defendant.

The onus was on Plaintiff to establish the illegitimacy of Boyi and he failed signally to discharge it. He based his allegation on the premise that Mulambo, during his lifetime, paid over no lobolo for Boyi's mother (whose identity was not established) and that as a result of that omission there was no marriage. Such a payment is not an essential of a customary union *vide* section 59 of the Code and no evidence was tendered to indicate that the essentials which are laid down were not present. The maxim *omnia praesumuntur rite esse acta* is applicable and it must be presumed that there was a customary union between Mulambo

and Boyi's mother, that Boyi is legitimate and, accordingly, heir is Mayiwase's house. In passing I would remark that it is grossly inequitable to seek to bastardise Boyi without giving him an opportunity of refutation.

Presuming for the moment that the payment of lobolo was an essential it is probable that there was a promise by Mulambo to pay lobolo which was only implemented after his death when his wife's maternal uncle took the lobolo of one of Boyi's sisters.

Plaintiff's contention that he is entitled to the house property (the five cattle concerned) of the late Mayiwase fails and is not claimable by him.

The "isidwaba" (the skin skirt usually worn by married women) concerned was the personal property of Plaintiff's mother and cannot, by any stretch of imagination, be regarded as house property and subject to an inter-house debt. Whoever may be liable to return the "isidwaba" or pay a beast in lieu thereof it is my view that it is not Defendant. Plaintiff's evidence regarding the "isidwaba beast" is contradictory and that which purports to involve Defendant is based on hearsay.

Defendant cannot be heard to say that he inherited nothing from his father when, in fact, he inherited the lobolo rights in his sisters Mntandazi and Zitlophi Esther [*vide Ngcobo vs. Mkize* 1 N.A.C. 249 (N.E.)]. The latter married and it is an admitted fact that of her lobolo Defendant personally received five head, his late mother received three and three head are still due to him.

In the result the appeal and cross-appeal fail and both must be dismissed with costs.

Yates, President, and Colenbrander, Member, concurred.

For Appellant and cross-Respondent: Mr. F. Sithole, Durban.

For Respondent and cross-Appellant: Mr. W. E. White, Eshowe.

NORTH-EASTERN BANTU APPEAL COURT.

SIGEGE SHANDU vs. HLANJANA SHANDU.

B.A.C. CASE No. 13 OF 1967.

ESHOWE: 26th January, 1967. Before Yates, President, Craig and Colenbrander, Members of the Court.

BANTU LAW AND CUSTOM.

Lobolo—allocation—ownership—earnest or engagement cattle— locus standi *of intended bridegroom—when payable—kraal and house property.*

Summary: A father allocated certain cattle to be used as lobolo for one of his sons who proposed to enter into a customary union. The father died and the son sued the kraal heir for the cattle though the proposed customary union had not yet been celebrated.

Held: That the intended bridegroom had no *locus standi* to sue as he was not a party to the contract between his father and the father of his intended bride.

Held: That the cattle remained "engagement" cattle until the union was celebrated.

Works referred to:

"Principles of Native Law and the Natal Code" by Stafford & Franklin.

"Native Law in South Africa" by Seymour.

Rules referred to:

Bantu Affairs Commissioners' Courts Rule 53.

Appeal from the Court of the Bantu Affairs Commissioner, Mtunzini.

Yates, President:

Plaintiff (now Respondent) sued his brother, Defendant (now Appellant) for certain cattle which he alleged had been pointed out by his late father, during his lifetime, to be used for his (Plaintiff's) lobolo and that Defendant, their father's heir, now refused to honour his obligations. It is unnecessary to set out the pleadings in full for at the hearing the Additional Bantu Affairs Commissioner requested the parties to state shortly the issues of fact and questions of law in dispute and the remarks of Mr. Schreiber who appeared for Plaintiff in the court below and which are recorded as follows clearly indicate the basis of his claim:—

"Plaintiff will lead evidence—

(*a*) that the parties' late father Ncwadi actually allowed six (6) cattle, from the Ikohlo house, to be driven to Plaintiff's prospective father-in-law and pointed out to him as lobolo to be paid to him on behalf of Plaintiff;

(*b*) these cattle were taken back and remained in Ncwadi's possession. That later Ncwadi agreed with Plaintiff's father-in-law that he would add two more cattle to the lobolo and these were described by word of mouth but not actually shown to the prospective father-in-law;

(*c*) that Plaintiff, the girl and her father are still prepared to go through with the marriage, which has not yet taken place, but the said Ncwadi has died and Defendant refuses to allow the said cattle to be paid as lobolo for the Plaintiff;

(*d*) that the foregoing relates to Plaintiff's proposed second marriage and the lobolo in respect of Plaintiff's first marriage was paid by the said late Ncwadi, out of *house property* of the Ikohlo house;

(*e*) that the lobolo for the two wives for Defendant were paid for by the late Ncwadi out of *house property* of the Ikohlo house".

Mr. White who appeared for Defendant in both courts contended that even if all Plaintiff's allegations were established by evidence he still could not succeed for the following reasons:—

"(1) The Defendant is not obliged to honour any such alleged disposition by the late Ngwadi under the circumstances averred.

(2) On the Plaintiff's allegations the cattle in question are not the property of the Plaintiff and he has no legal claim to them."

The question of law was then argued in accordance with rule 53 (6) of the rules for Bantu Affairs Commissioners' Courts contained in Government Notice No. 2886 of 1951, and the Commissioner upheld Mr. White's contention and gave judgment for Defendant with costs.

An appeal has now been noted against that judgment on the grounds that " it was bad in law in that:—

(1) The father of both parties, Ncwadi Shandu, during his lifetime, donated to Plaintiff certain eight head of cattle for the purpose of assisting Appellant to pay lobolo for his second wife.

(2) The parties' said father, Ncwadi Shandu, died before the said second marriage of Appellant had been celebrated but after the said cattle had been driven to the bride's father, pointed out to him and returned to the said Ncwadi Shandu.

(3) On the death of the said Ncwadi Shandu, without revoking the said donation, it became confirmed, and Respondent had no right, as he purported to, to revoke the said donation, or for some other reason, refuse to allow Appellant to use the said cattle to pay as arranged."

In his reasons for judgment the Commissioner came to the conclusion that the crux of the matter was whether—

" (*a*) Defendant was obliged to honour the disposition of his late father under the circumstances averred;

(*b*) whether ownership in the cattle had gone over to Plaintiff or not."

Mr. White contended that, as agreed when the case was argued (*vide supra*), these cattle constituted " house " property and therefore could not be disposed of by way of donation (*vide* page 287, paragraph 5 of the Natal Code by Stafford and Franklin). Any attempt to give the cattle away was therefore invalid from the start.

In the particulars of claim it was stated that the cattle were " kraal " property but this was denied in the plea. Mr. Brien, who appeared on behalf of the Plaintiff, argued that the cattle were " kraal " property in the Ikohlo house as Plaintiff and Defendant were full brothers. Defendant being the heir, the dispute being confined to that house, and that being so, the father had the right to dispose of all " kraal " property in that house. House property is property vested in and pertaining specially to any house in a kraal as opposed to " kraal " property which means all property in a kraal other than " house " and " personal " property [see definition in section 1 (3) of the Natal Code] and if evidence had been led in the instant case it might have been possible to have come to a definite finding on this point. In the absence of such a finding the court is bound by the statements accepted in court, i.e. that the cattle are " house " property, which would appear to dispose of the matter.

However, even if that were not so, it is clear that the late Ncwadi had pointed out the cattle which were to be used for the payment of Plaintiff's lobolo, which is in accordance with Bantu custom; but in such cases the cattle remain earnest or engagement cattle until the customary union takes place and therefore the property of the payer—see *Sikoloza vs. Moya*, p. 60, N.H.C. quoted by Stafford and Franklin at page 155, paragraph 10, and " Native Law in S.A. " (2nd edition) by Seymour at pages 67 and 107/8 and the authorities cited therein.

Mr. Brien contended that this approach was wrong as an allocation had been made by the father for a specific purpose. However, in view of the above authorities and those referred to by the Commissioner in his "reasons for judgment", and to the circumstances of this case, i.e. that the customary union had not yet taken place, it is clear that the ownership of the cattle had not vested in the payee at the time of the father's death and could not be regarded as an unconditional donation.

Furthermore, in this case, the Plaintiff was not a party to the contract between his father and the father of his intended bride so that he has no *locus standi* to enforce compliance with the agreement. The only person who could do this would be the bride's father when the customary union takes place. Mr. Brien argued that the claim could be read to infer that it was made for specific delivery of the cattle to Plaintiff's prospective father-in-law in fulfilment of the allocation by his father. This viewpoint, however, is not borne out by a perusal of the summons.

The appeal, therefore, is dismissed with costs.

Craig and Colenbrander, Members, concurred.

For Appellant: Mr. S. H. Brien i.b. Davidson & Schreiber, Empangeni.

For Respondent: Mr. W. E. White, Eshowe.

NORTH-EASTERN BANTU APPEAL COURT.

PETROS MNTUNGWA vs. JOSHUA JALI.

B.A.C. CASE No. 14 OF 1967.

DURBAN: 9th March, 1967. Before Yates, President, Craig and Harvey, Members of the Court.

PROCEDURE.

Appeal—late noting—condonation—form of application.

Summary: The reader is referred to the concise report below.

Rules Referred to:

Bantu Appeal Court, No. 7.

Works Referred to:

"A Digest of S.A. Case Law", by H. W. Warner.

Appeal from the Court of the Bantu Affairs Commissioner, Durban.

Yates, President:

The first matter to be dealt with here is an application for condonation of the late noting of the appeal.

Mr. Noren, who appeared on behalf of Applicant, conceded that there was no proper application before the Court and stated that the only matter he wished to raise on appeal was the amount of damages awarded by the Commissioner.

What purported to be an application by Appellant for condonation of the late noting of the appeal was in fact merely an affidavit setting out the reasons for the late noting and it included a request for condonation. It was not properly stamped and could therefore not be considered as a proper application. There is no legal sanction in any event for including an application of this nature in an affidavit. An application as such duly stamped must be accompanied by an acceptable affidavit.

Mr. Noren also stated that the procedural steps taken were regrettable and that in any case he was in no position to ask for costs. The attorney concerned would be well advised to study the requirements for applications for condonation of the late noting of appeals as contained in the rules and in previous decided cases.

Mr. Lewin, who appeared on behalf of Respondent, pointed out that the notice of appeal did not comply with Rule 7 of the Rules for the Bantu Appeal Court contained in Government Notice No. 2887 of 1951 in that it was not stated whether the whole or part of the judgment was appealed against. This requirement is peremptory—see paragraph 353 of Warner's Digest of S.A. Native Civil Case Law and the authorities there cited.

There being no valid application before the Court the case is struck off the roll with costs.

Craig and Harvey, Members, concurred.

For Appellant: Adv. D. Noren i.b. I. Matlare & Co., Durban.

For Respondent: Mr. L. M. Lewin i.b. Logie & Sellick, Durban.

BANTU ADMINISTRATION AND DEVELOPMENT
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SPRINGS
BANTOE-ADMINISTRASIE EN -ONTWIKKELING

NORTH-EASTERN BANTU APPEAL COURT.

TITUS KUMALO vs. T. F. NDHLOVU.

B. A. C. CASE NO. 3 OF 1967.

Pietermaritzburg: 30th March, 1967, before Yates, President, and Craig and Reibeling, Members of the Court.

COMMON LAW.

Defamation—privileged occasion—honest purpose.

Summary: Plaintiff sued Defendant for R500 damages for defamatory statements contained in a letter sent to the Town Clerk at Utrecht. The letter reported the presence of Plaintiff on town lands as an illegal squatter and it was Defendant's duty to do so. He went further, however, and alleged that Plaintiff might interfere with witnesses if he were not locked up and refused bail and explained that it was because Plaintiff came to him for advice on how to enter the town lands without authority.

Held: That the further allegations exceeded the bounds of privilege.

Cases referred to:

Blumenthal vs. Shore 1948 (3) S.A. (A.D.) 671 at page 680.

Works referred to:

"The Law of Delict", by McKerron, 6th edition.

Appeal from the Court of the Bantu Affairs Commissioner, Utrecht.

Yates, President:

Plaintiff (now Appellant) sued Defendant (now Respondent) for R500 damages for defamation alleging that:—

> "On the 7th December, 1965, the Defendant wrongfully, unlawfully and maliciously wrote and published a letter copy whereof is herewith annexed to the Town Clerk, Utrecht, which letter was duly received by the latter and his staff.
>
> In the said letter, the Defendant meant to convey, and did convey that the Plaintiff was not desirable or fit person to live in urban area of Utrecht, and had committed the crime of defeating the ends of justice, which was false and untrue."

Defendant pleaded as follows:—

> "Defendant admits having written a letter to the Town Clerk of Utrecht but avers that this was in confidence and not meant to be published and avers further that the contents of the said letter are true in substance and in fact and it was and is in the interest of the public and is therefor privileged.
>
> The Defendant denies that Plaintiff has sustained any damages whatever."

The Bantu Affairs Commissioner gave an absolution judgment with costs and against this judgment an appeal has been noted on the grounds that:—

"(1) The Court having held that the statement contained in the letter is per se defamatory, the onus was therefore on Defendant to justify the use of the words therein. The judgment dismissing the action was therefore not competent.

(2) The Defendant exceeded or abused whatever privilege he might have had in making the communication, consequently the Court erred in not awarding Plaintiff damages.

(3) In any event the learned Bantu Affairs Commissioner erred in his application of the law."

It appears from the evidence that on the 8th September, 1965, Defendant had been prosecuted for being in the proclaimed area of Utrecht unlawfully for longer than 72 hours and he was found not guilty and discharged. A census was subsequently taken in November 1965 which indicated that there were then over 400 squatter families illegally on the commonage and on 23rd idem the Town Clerk called a public meeting attended by 300-350 Bantu of the location in which he appealed for their co-operation and asked them to inform the authorities if they became aware of squatters coming in so that steps could be taken to combat the situation. He also assured them that any information furnished would be regarded as confidential.

On the 7th December, 1965, Defendant wrote a letter to the Town Clerk in which he stated *inter alia* that Plaintiff and his family occupied a house which belonged to one Albert Ndaba on a site which belonged to Masondo so that, by inference, they were in the location illegally.

Mr. Menge, who appeared on behalf of the Plaintiff, conceded that if the letter had stopped there, there would have been no difficulty but the defendant proceeded to write as follows:—

> "If you work through the police (S.A.P.) it will be necessary to arrest, lock in Khumalo and refuse bail for he will interfere with would be crown witnesses.
>
> According to Khumalo all is now well and has now taken full occupation *illegally* because he was successful in defeating the ends of justice on 8th September, 1965.
>
> Once the Court is aware of the false statement given to Court on 8th September, 1965, then Khumalo will bear it hard.
>
> I waited long to disclose the above facts, because I wanted him to establish himself fully well and for him to feel confident he had successfully defeated the ends of justice. I am a teacher at the Utrecht Bantu School and should you desire to see me personally simply phone 135 Utrecht and ask for T. F. Ndlovu."

and he contended that this portion of the letter bristled with malice.

At the outset of the hearing defendant admitted that the letter was *per se* defamatory and accepted the onus of establishing that the contents were true in substance and in fact and that it was written in the interest of the public and therefore privileged.

It is clear from the evidence of the Town Clerk that the Plaintiff had not applied either for permission to be in or to work within the municipal area and that despite his earlier acquittal on a criminal charge he was there illegally. Also the Commissioner accepted Defendant's evidence that after the criminal case Plaintiff had told him that he had been acquitted because he had told the court that he was putting up a building for Albert Ndaba and that from the conversation he (Defendant) came to the conclusion that Plaintiff was in fact erecting it for himself. No good reason has been advanced why the Commissioner's finding in this regard should not be accepted and I am satisfied that Defendant was under the well-founded impression that Plaintiff was in the area illegally and had been discharged in the criminal case as a result of a false statement made by him.

There is no question but that the occasion was invested with a qualified privilege bearing in mind the appeal by the Town Clerk for information in regard to squatters being in the urban area without authority. Defendant was not only under a moral and social duty to furnish such information if it came to his knowledge but as a resident of the area it was in his interest and that of the other residents that those there illegally should be evicted. Furthermore the communication itself was privileged for there is no doubt that it was relevant to the occasion.

The question is whether or not the Defendant went too far and here it must be remembered that the protection afforded by qualified privilege is conditional upon the statement complained of having been made with an honest purpose. Once it is established that the occasion and the communication are privileged then the onus in on the Plaintiff to establish malice on the part of the Defendant—see *Blumenthal v. Shore* 1948 (3) S.A. (A.D.) 671 at p. 680.

Here Defendant had given information to a local authority, at the latter's request, which he had been informed would be regarded as confidential, so that he was entitled to assume that it would not be published and in fact would only come to the notice of those officials directly concerned with the contents, so that obviously he did not anticipate that the contents of the letter would become public property. In some manner, which was not disclosed by the evidence, a member of a deputation of five who were authorised to speak on behalf of the location inhabitants came into possession of a copy of this letter and gave it to Plaintiff. Defendant had grounds for believing that the Plaintiff's presence in the urban area was illegal and that he had made a false statement to escape conviction so that his observations in this regard were made in good faith. However, there seems to have been no foundation for his allegation that Plaintiff might interfere with witnesses unless he was locked up and refused bail and his explanation that it was because Plaintiff came to him for advice how to enter the townlands without authority, certainly does not furnish reasonable grounds. As stated in "The Law of Delict" by McKerron at p. 185 (6th Ed.) "The authorities clearly establish that protection afforded to a communication made on a privileged occasion may extend to language which is violent or unnecessarily strong, provided that the person using the language, honestly and on reasonable grounds believed that what he wrote or said was true and was necessary for the protection of the interest or the discharge of the duty upon which the privilege was founded."

This allegation does not seem to me to have been necessary either for the protection of the interest or the discharge of the duty upon which the privilege was founded nor was it based on reasonable grounds. It does therefore constitute defamation but in view of the circumstances I consider that an award of R10 as damages will be adequate.

The appeal is allowed with costs. The judgement of the Bantu Affairs Commissioner is set aside and or it is substituted "Judgement for Plaintiff for damages in the sum of R10 with costs".

Craig and Reibeling, Members, concurred.

For Appellant: Adv. W. O. H. Menge i.b. Uys & Boshoff, Vryheid.

For Respondent: Adv. J. H. Combrink i.b. Shawe & Bosman, Utrecht.

NORTH-EASTERN BANTU APPEAL COURT.

FLOMENA SITHOLE d.a. VULITSHE SITHOLE vs. MGIJIMI SITHOLE.

B.A.C. CASE NO. 12/67.

Pietermaritzburg: 31st March, 1967, before Yates, President, and Craig and Reibeling, Members of the Court.

BANTU LAW.

"Milk" beast—accrues to house established by marriage—normally wife no locus *standi in* judicio *thereanent.*

Summary: Plaintiff, a woman duly assisted by her husband sued her father-in-law for certain cattle of which he had allegedly taken wrongful possession and which she stated were the progeny of a cow given to her for milking purposes by her guardian when she married.

Held: That Plaintiff had no *locus standi* to sue and that only her husband could maintain such an action as that cow accrued to the house established by her marriage.

Cases referred to:

Mtshali vs. Mhlongo 1944 N.A.C. (T. N.) 71.

Works referred to:

"Principles of Native Law and the Natal Code" by Stafford & Franklin.

Legislation referred to:

Natal Bantu Code Sections 1 (3) (*f*), 27 (2), 107.

Appeal from the Court of the Bantu Affairs Commissioner, Impendhle.

Craig, Permanent Member:

Plaintiff sued Defendant for certain eight head of cattle being the progeny of a beast allegedly given to her as a "milk" beast by her guardian Paulus Shezi at the time of her marriage to her husband Vulitshe Sithole which cattle were taken possession of by her father-in-law, the Defendant. The latter pleaded that the cattle were his property and after hearing the Bantu Affairs Commissioner entered judgment for Plaintiff for the eight cattle with costs.

An appeal to this Court was noted on the following grounds:—

"(1) That the judgment was against the weight of evidence.

(2) That the Bantu Affairs Commissioner erred in accepting the evidence of the Plaintiff in this case.

(3) That the Plaintiff failed to prove ownership and had no *locus standi* in this action.

(4) That Plaintiff's summons was bad in law in that the Plaintiff did not claim ownership of the said cattle in her summons.

(5) At the least, the Bantu Affairs Commissioner should have granted an absolution from the instance with costs in this matter."

It is necessary only to consider that portion of the appeal which deals with the legal point of Plaintiff's *locus standi* in *judicio* to maintain this action.

It is trite Bantu Law in Natal that Plaintiff is a perpetual minor and has no *locus standi in judicio vide* section 27 (2) of the Natal Bantu Code and "Principles of Native Law and the Natal Code" by Stafford & Franklin at page 59 *et seqq.* and that the "milk" beast allegedly given to her at the time of her marriage did not become her personal property but accrued to the "house" created by her marriage to her present husband—*vide* section 107 of the Natal Bantu Code and *Mtshali vs. Mhlongo* 1944 N.A.C. (T. & N.) 71. While section 107 refers specifically to a customary union a "house" is nevertheless created by her entry into a civil marriage *vide* section 1 (3) (*f*) of the Natal Code and the notes on the subject by Stafford and Franklin in "Principles of Native Law and the Natal Code" at pages 185—186. In the circumstances of this case only her kraalhead and husband could maintain an action for recovery of the cattle from Defendant.

While the Commissioner may well have been correct in finding that the cattle concerned are the progeny of a beast given by Plaintiff's guardian to her at the time of her marriage for her sustenance he erred in permitting her to proceed with the action.

Plaintiff conceded in her address to this Court that she would have no power, for example, to sell these cattle and that such power vested in her husband.

The appeal must be allowed with costs, the Bantu Affairs Commissioner's judgment set aside and for it substituted "The claim is dismissed with costs".

Yates, President, and Reibeling, Member, concurred.

For Appellant: Mr. C. S Ntloko i.b. L. A. Tod & Co., Pietermaritzburg.

For Respondent: In person.

NORTH-EASTERN BANTU APPEAL COURT.

B. A. CASE NO. 29 OF 1967.

LIZA SOKHELE vs. ELIAS GENA SHELEMBE.

Pietermaritzburg: 4th April, 1967, before Yates, President, and Craig and Reibeling, Members of the Court.

COURTS.
JUDGMENTS.
NOVATION.

Chiefs' Courts – judgment—novation in Bantu Affairs Commissioners' Courts.

Summary: Plaintiff was awarded a judgment in a Chief's court against Defendant. She sought to have this judgment made a judgment of the Bantu Affairs Commissioner's Court in order to enable her to levy execution by way of a garnishee order on Defendant's employer who is a non-Bantu.

Held: That the principle of novation is applicable and that a legal judgment of a Chief's court can be made a judgment of a Bantu Affairs Commissioner's court.

Cases referred to:

Mereotle & ano vs. Tsele & ano. 1951 N.A.C. (CO) 63.

Mangweli vs. Sgwene 1952 N.A.C. (N. & T.) 73.

Mdumane vs. Mtshakule 1948 N.A.C. (C. &. O.) 28.

Joosab vs. Tayob 1910 T.P.D. 486.

Greathead vs. Greathead 1946 T.P.D. 406.

Payiyana Bhulose vs. Qubimpi Bhulose 1947 N.A.C. 5 (T. & N.)

Matshamba vs. Mbundu 1956 N.A.C. 39 (S.).

Works referred to:

H. W. Warner's "A Digest of South African Native Civil Case Law" paras. 231 and 917.

Jones & Buckle's "The Civil Praetice of the Magistrates' Courts of South Africa".

Rules referred to:

Chiefs' and Headmen's Civil Courts: Rules 7, 8.

Legislation referred to:

The Bantu Administration Act No. 38 of 1927 Sections 10, 12, 17.

Appeal from the Court of the Bantu Affairs Commissioner's Court, Lion's River at Howick.

Craig, Permanent Member:

In the Bantu Affairs Commissioner's Court Plaintiff (now Appellant) sued Defendant (now Respondent) and the Partieulars of Claim are:—

"The Plaintiff's Claim is against the Defendant for payment of the sum of R25.80.

(1) Both parties hereto are Bantu as defined by Act 38 of 1927.

(2) On the 4th day of January, 1966, the Plaintiff obtained a judgment against the Defendant in the Court of the Native Chiefs', Howick, for payment of the sum of R25.80.

(3) In the premises the Plaintiff is entitled to have the said Judgment made a Judgment of the above Honourable Court.

Wherefore Plaintiff prays for Judgment in the sum of R25.80 with costs."

Defendant exeepted to the summons on the ground that it does not diselose a eause of action and the Magistrate (sic.) upheld the objection with costs.

Plaintiff has appealed to this court as follows:

"Be pleased to take notiee that the Plaintiff in the above matter hereby notes an appeal against the whole of the judgment of the learned Bantu Affairs Commissioner in the abovementioned matter, on the grounds that the said judgment was wrong in law, and on the grounds that the learned Bantu Affairs Commissioner erred in holding that the Plaintiff was not entitled in law to institute proceedings in the Bantu Affairs Commissioner's Court, for the purpose of having a judgment granted in her favour in the Court of the Bantu Chief made a judgment of the Bantu Affairs Commissioner's Court."

The appeal was noted late but as no fault lay with the Plaintiff or her attorney eondonation was granted.

Before dealing with the question of the exception I wish to make certain comments regarding the conduct of the proceedings and the views expressed by the judicial officer in his reasons for judgement.

He conducted these proceedings as Magistrate and as such had no jurisdiction *vide* section 17 (4) of the Native Administration Act. 1927 (Act No. 38 of 1927). It will be presumed, however, that he did so by oversight and inadvertently omitted to describe himself as Bantu Affairs Commissioner.

To turn to his reasons for judgment his reason for including a paragraph regarding the use of the words "appellant" and "respondent" eludes me. It seems to have no bearing on the case.

At no time did Plaintiff express dissatisfaction with the Chief's judgment. She wants to enforce it and not to change it by way of appeal.

A case may not be started *de novo* in a Bantu Affairs Commissioner's Court after a final and definitive judgment in respect of the same case has been given in a Chief's 'court provided jurisdiction has been conferred on such chief in terms of section 12 of Act 38 of 1927 and the judgment has been registered in terms of Rule 7 of Chiefs' and Headmen's Civil Courts (Government Notice No. 2885 of 1951, as amended). Such a jugment can certainly figure in a plea of *res judicata.* The Commissioner's attention is directed to the judgements in the cases of (1) *Mereotle & ano. vs. Tsolo & ano.* 1951 N.A.C. (C.D.) 63 (2) *Mangweli vs. Sgwene,* 1942 NA.C. (N. & T.) 73 (Warner's "Digest of S.A. Native Civil Case Law" paragraph 231) and (3) *Mdumane vs Mtshakule* 1948 N.A.C. (C. & O.) 28 (Warner, paragraph 917).

It is clear from the arguments advanced in this court that the exception taken in the court *a quo* was based solely on the question of whether the judgment of a Bantu Chief's court can, by process of judicial novation, be made a judgment of a Bantu Affairs Commissioner's Court. The only question, therefore, which this court is called upon to answer is whether or not the Commissioner erred in upholding that exception and, solely for the purpose of a judgment on that point, it will be presumed that the Chief's judgment is a valid one in all respects *vide supra re* jurisdiction and registration and that in all other respects the claim is in order.

Mr. E. H. R. Titren of Howick appeared for Appellant and Mr. L. Nathan of Messrs. Cecil Nathan & Beattie for Respondent in this court and it was agreed by them that whatever the judgment of this court there should be no order as to costs of appeal. Hereafter the parties will be referred to as Plaintiff and Defendant.

Mr. Titren explained that the object of these proceedings was to provide a means of execution against Defendant who was employed by the Howick Rubber Factory, a European owned concern, by means of garnishee proceedings. He pointed out correctly, that such proceedings were not available under Bantu law but that if the Chief's judgment were novated by one in the Bantu Affairs Commissioner's Court a remedy would be available to Plaintiff in terms of section 10 (6) of Act No. 38 of 1927.

He argued that the peremptory requirement of Chiefs' Courts Rule 8 to the effect that execution of a Chief's judgment "shall be in accordance with the recognised customs and laws of the tribe (concerned)", would fall away if the Chief's Court judgment became a judgment of the Bantu Affairs Commissioner's Court.

Further he argued that though no specific machinery was provided for the novation sought by Plaintiff whose case, obviously, had been tried under Bantu Law and Custom as it had its inception in a Bantu Chief's Court, the same lack existed in respect of

Magistrates' Courts and Supreme Courts, but, nevertheless, novation by established principle occurred between the two latter courts. He submitted that there was no good reason for withholding this principle from Chiefs' and Bantu Affairs Commissioner's Courts.

In support of his argument he quoted from Jones & Buckle's "The Civil Practice of the Magistrates' Courts of South Africa" 6th edition at pages 197-198 under the subheading "Section 65 and Superior Court Judgments" and from the case of *Joosab vs. Tayob* 1910 T.P.D. 486 at page 488 which was approved in *Greathead vs. Greathead* 1946 T.P.D. at 406.

In reply Mr. Nathan submitted that though it was unfortunate that in the present circumstances Plaintiff had chosen the wrong forum in which to sue in the first instance she was without remedy until such time as execution could be levied "in accordance with the laws and customs of the tribe". He quoted the cases of *Payiyana Bhulose vs. Qubimpi Bhulose* 1947 N.A.C. 5 (T. & N.) and *Matshamba vs. Mbundu,* 1956 N.A.C. 39 (5) in support of his submission that common law principles such as novation do not apply in a Bantu Chief's Court.

Mr. Nathan's argument regarding "common law principles" must fail as no effort is being made to apply them in the Chief's Court. That court has given judgment presumably without importing "common law principles" and there proceedings ended.

I can find no authority for holding that the principle involved in this matter does not apply where a Chief's judgment is concerned and I am of the opinion that there is substance in Mr. Titren's argument.

In Joosab's case, *supra,* Wessels J. is reported as saying "I think I am right in saying that it is the universal practice in every country to regard a judgment as a novation of the former debt on which the judgment was granted and that the judgment itself therefore constitutes a new debt. It does not matter whether the court is an inferior or superior court, a foreign court or a domestic court—the same rule applies; the judgment novates the former debt and creates a new debt upon which suit can be brought".

In Mdumane's case, *supra,* Sleigh, President, is reported as saying "The Court of a chief, who has been duly authorised to try civil cases forms part of the judicial organisation of the land. Its judgment are binding on the parties and are recognised and will be given effect to by the highest courts of the country".

With these remarks I respectfully agree.

As was said further in Mdumane's case "Courts of Native Commissioners and Chiefs have concurrent jurisdiction in their respective areas" and that that is so is apparent from the provisions of sections 10 and 12 of Act 38 of 1927.

I came to the conclusion, therefore, that the principle of novation is applicable in respect of judgments under Bantu Law and as between the properly constituted Courts of Chiefs and of Bantu Affairs Commissioners and that the Bantu Affairs Commissioner erred in upholding the exception.

Accordingly, the appeal is upheld with no order as to costs and the judgement of the Bantu Affairs Commissioner is set aside and for it is substituted "The exception is dismissed with costs".

Yates, President, and Reibeling, Member, concurred.

For Appellant: Mr. E. H. R. Titren, Howick.

For Respondent: Mr. L. Nathan (Cecil Nathan, Beattie & Co., Pietermaritzburg).

NORTH-EASTERN BANTU APPEAL COURT.

JOHANNES NXUMALO vs. VINCENT and ABNER NXUMALO.

B.A.C. CASE NO. 19 OF 1967.

Eshowe: 25th April, 1967, before Yates, President, and Craig and Colenbrander, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal from Chief's court—fee for Chief's Reasons for Judgment—Chief's reasons—arbitrary dispensation—Assault—no harm suffered.

Summary: The Plaintiff was awarded damages for assault against both Defendants. The Bantu Affairs Commissioner upheld an appeal and altered the Chief's judgment to one in favour of Defendants. The Chief did not file reasons for judgment and the Court dispensed arbitrarily with them. The attorneys for the parties agreed that it was not necessary to deposit fees for the Chief's reasons for judgment. The assault concerned was a trivial one and Plaintiff suffered no harm.

Held: That a deposit for a Chief's reasons for judgment is required.

Held: That though the arbitrary dispensation with the Chief's reasons could not be condoned the cause of action was so trivial that to send the case back to enable the Chief's reasons to be filed would result in unnecessary expense.

Held: That the assault concerned was trivial and resulted in no harm to the Plaintiff.

Held: That the appeal should fail.

Cases referred to:

Myeni vs. Myeni 1955 N.A.C. 79.

Majola vs. Mayandu 1943 N.A.C. (N. & T.) 12.

Works referred to:

"A Digest of S.A. Native Civil Case Law" by H. W. Warner.
"S.A. Criminal Law and Procedure" by Gardiner & Lansdown, 6th edition, Volume 2.

Rules referred to:

"Chief's and Headmen's Civil Courts" Regulation 9 (2).

Appeal from the Court of the Bantu Affairs Commissioner, Nqutu.

Craig, Permanent Member:

Plaintiff sued the Defendants in a Chief's Court for R100 each as damages for alleged assault. Defendant No. 1 denied assault and stated "I only pushed him into the house". Defendant 2 pleaded a denial. The Chief gave judgment of "For Plaintiff against both Defendants for R10 and costs of suit R3.80. Costs of appeal—25 cents". An appeal to the Bantu Affairs Commissioner's Court was upheld with costs and the Chief's judgment was altered to read "For Defendant with costs".

An appeal to this Court has been noted on the following grounds:—

(1) The Court erred in not upholding the Plaintiff's objection to the hearing of the appeal against the Chief's judgment, based on the ground that the appeal had not been noted in that the Defendants had not deposited payment for the Chief's reasons for judgment.

(2) The Court erred in proceeding with the appeal in the absence of the Chief's reasons for judgment.

(3) The Court erred in awarding Defendants a full judgment.

(4) The 1st Defendant having admitted in his plea in the Chief's Court that he pushed the Plaintiff, and the said plea not having been altered or amended, the Court erred in accepting the defence version in the absence of an explanation of the plea.

(5) The Court's judgment is against the evidence and the law.

There would be substance to the first ground of appeal if there were anything on the record to establish that the fees called for by Regulation 9 (2) of Government Notice No. 2885 of 1951 as amended by Government Notice No. 868 of 1958 (Chiefs' and Headmen's Civil Courts: Regulations) had not, in fact, been deposited. Plaintiff's attorney raised the point that there had been no such deposit but that did not establish the fact. Contrary to the accord of the attorneys for both parties such deposits are necessary *vide* Rule 9 (2).

There is substance in the second ground of appeal as a Chief's "Reasons for Judgment" are a *sine qua non* in appeals from his Court. The Commissioner acted irregularly in dispensing, in the manner he did, with "Reasons", presuming for the moment that he did so at the start of the trial and not after he received the notice of appeal to this Court, though the record is silent on the point (See Warner's "Digest" at para. 4214). His decision to dispense must be used judicially and not arbitrarily and his attention is directed to the full reports of the cases summarised in paragraph 266 of Warner's "A Digest of S.A. Native Civil Case Law".

His statement that "In any event such reasons are invariably of no assistance to the Court of the Bantu Affairs Commissioner" is irresponsible. Not having had sight of the Chief's "Reasons" in the instant case the Commissioner was in no position to judge of their quality.

Normally, this Court would have considered setting aside the Commissioner's judgment and sending the case back to him for reconsideration after compliance with Chiefs' Courts Regulation No. 11 *vide Myeni vs. Myeni* 1955 N.A.C. 79 (N.E.) but, for reasons which appear more fully hereafter this course was not followed in the present case.

The Plaintiff in the Court below admitted that "The whole matter is a storm in a tea cup". The onus was upon him to establish the occurrence and density of that storm. His evidence that neither Defendant said a word and without any reason allegedly assaulted him is improbable and unacceptable. He was inconsistent and untruthful in that he said Defendant No. 1 pulled him and No. 2 tried to hit him and then that "Defendants hit me with their fists after they grabbed hold of me. Both Defendants hit me". Under cross-examination he contradicted himself again by alleging that Defendant No. 1 did speak to him by saying "come here" and then alleging that Defendant No. 2 did not touch him.

Plaintiff claimed to have been treated by a doctor but did not call the latter to testify. He alleged that his clothing had been torn by Defendants but produced no corroborative evidence.

It is significant that Wilson Zungu, whom Plaintiff alleged was present at the assault, was not called to testify. No reason for this omission was advanced.

Clearly Plaintiff has exaggerated the whole affair.

Obviously, there was an assault in this case vide the definition at page 1570 of Gardiner & Lansdown's "S.A. Criminal Law and Procedure" Vol. II, 6th edition. In first Defendant's reply to the claim in the Chief's Court he denied an assault but continued ". . . I only pushed him into the house". This is capable of being regarded as an intentional and unlawful application of force. In the Commissioner's Court Defendant No. 1 admitted catching Plaintiff by the elbow when the latter wished to walk past a hut which Defendant wished him to enter. It is a reasonable inference that Defendant No. 1 used some force to detain Plaintiff as he stated under cross-examination "I was upset by the accusations made by Plaintiff". Plaintiff had, allegedly, accused Defendant No. 1 of chasing his (Plaintiff's) wives away.

Clearly Defendant No. 2 took no part in the assault which was a trivial one by Defendant No. 1. Plaintiff failed to establish that he suffered any harm from the assault (*Majola vs. Mnyandu* 1943 N.A.C. (N & T) 12) and the appeal should fail.

For these reasons and without condoning the irregularity in regard to the Chief's reasons for judgment it is my view that unnecessary expense would be occasioned by referring the matter back to the Commissioner's Court *vide* supra and that the appeal should be dismissed with costs.

Yates, President and Colenbrander, Member, Concurred.

For Appellant: Mr. W. E. White i.b. Uys & Boshoff, Vryheid.

For Respondent: Mr. B. Wynne i.b. Smith, Lyon & Thorrold, Dundee.

NORTH-EASTERN BANTU APPEAL COURT.

MKHUZENI NTULI vs. MBOMVU MTIYANE.

CASE NO. B. A. C. 20 OF 1967.

Eshowe: 25th April, 1967 before Yates, President, and Craig and Colenbrander, Members of the Court.

PRACTICE AND PROCEDURE.

Interpleader proceedings—incompetent after execution completed.

Summary: Interpleader proceedings were instituted after cattle had been attached and handed over to the execution creditor.

Held: That such proceedings were void *ab origine.*

Cases referred to:

Nkosi vs. Nsele 1963 B.A.C. (N.E.) 56.

Rules referred to:

Bantu Affaris Commissioners' Courts: Rule 70.

Appeal from the Court of the Bantu Affairs Commissioner, Empangeni.

Yates, President:

This is an appeal from the judgement of a Bantu Affairs Commissioner's Court declaring certain six head of cattle which had been attached in pursuance of a judgment in favour of Mkhuzeni Ntuli, the judgment creditor (now Appellant) against one Vimba Mtiyane, the judgment debtor, to be not executable with costs.

Mkhuzeni, the judgment creditor has appealed against this judgment on the grounds that it was against the evidence and the weight of evidence.

Before considering the grounds of appeal, however, the court *mero motu* took the point that although this purports to be an interpleader action in terms of Rule 70 of the Rules for Bantu Affairs Commissioners' Courts (Government Notice No. 2886 of 1951) it is clear from the Messenger of the Court's return of service and the evidence that the cattle were handed to the judgment creditor as soon as they were attached and were in his hands when the interpleader summons was issued. This case is on all fours with that of Nkosi v. Nesele 1963 B.A.C. (N.E.) 56 and the same reasoning applies here.

Mr. White, who appeared on behalf of the judgment creditor, did not press for costs. As neither the claimant nor the judgment creditor raised this point in the court below there will be no order for costs in that court either.

The appeal is allowed with no order as to costs. The proceedings in the lower court are declared to be void *ab origine* and are set aside with no order as to costs in that court.

Craig and Colenbrander, Members, concurred.

For Apellant: Mr, W. E. White i.b. F. P. Behrmann, Empangeni.

For Respondent: In default.

NORTH-EASTERN BANTU APPEAL COURT.

SAMUEL MALULEKA vs. WILHELMINA MAKUBELA.

B.A.C. CASE NO. 21 OF 1967.

Pretoria, 19th June, 1967, before Craig, Acting President and Gafney and Jansen, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal—disregard of rules.

The reader is referred to the full text of the judgment below.

Cases referred to:

Mahlatsi vs. Majola 1959 N.A.C. 78 (c).

Works referred to:

"A Digest of South African Native Civil Case Law" by H. W. Warner.

Authorities referred to:

Government Notice No. 2886 of 1951.

Government Notice No. 2887 of 1951.

Rules referred to:

Bantu Affairs Commissioners' Courts, Second Annexure, Table C, Item 10.

Bantu Appeal Court Rules 4, 7, 14, 16, Annexure Table A, Item 4.

Craig, Acting President:

In an interpleader action one Rubin Makubela was the Claimant, Samuel Maluleka (Plaintiff *supra*) the Execution Creditor and Wilhelmina Makubela (Defendant *supra)* the Execution Debtor. Certain cattle were attached and were, after hearing, declared executable with costs on 6th October, 1966.

The efforts to bring this judgment on appeal to this Court are chaotic and highlight the necessity for any legal practitioner who practises in this Court to make himself conversant with its rules and decisions. The Rules of the Bantu Appeal Court were published in Government Notice No. 2887 of 1951 and have been amended from time to time. Summaries of the Bantu Appeal Courts' decisions over the years are to be found in "A Digest of S.A. Native Civil Case Law" and its "Supplement" by H. W. Warner. The Rules for Bantu Affairs Commissioners' Courts as published in Government Notice No. 2886 of 1951, as amended, are also relevant to a limited extent in that according to the Second Annexure, Table C, Item 10, a notice of appeal from a judgment of a Bantu Affairs Commissioner's Court must bear a 75 cent revenue stamp and failing compliance with this requirement such notice is invalid and unacceptable *vide Mahlatsi vs. Majola* 1959 NAC 78 (C) (Warner's "Supplement" paragraph 29).

On 19th October, 1966, Defendant's (Wilhelmina Makubela) attorney lodged on her behalf an unstamped document dated 18th October, 1966, which reads, inter alia:—

"Appeal.....

Be pleased to take note that the Defendant hereby appeals against the Judgment of the Commissioner in the above matter in dismissing the Interpleader Summons."

This document was stamped 75 cents on 7th November, 1966.

On 25th October, 1966, the same attorney lodged another unstamped document on Wilhelmina's behalf. This was dated 24th October, 1966, and reads:—

"*Appeal*

Be pleased to take note that the Defendant hereby appeals against the judgment of the Commissioner in the above matter in dismissing the Interpleader summons.

Security in the sum of R15.00 (Fifteen Rand) is attached hereto.

Application will be made to amend the Notice of Appeal and condonation of the late noting when a copy of the record above is obtained."

This document remains unstamped to this day.

It is obvious that neither of these documents is a notice of appeal because, inter alia, neither complies with the peremptory requirement of Bantu Appeal Court Rule 7 that a notice of appeal shall state "the grounds of appeal clearly and specifically". It is pointless to argue that this cannot be done until the record of the case has been received and studied as an appeal can be noted forthwith on the sole ground that "the judgment is against the

evidence and the weight of evidence " with the right to apply in terms of Rule 14 for leave to lodge additional grounds *vide* Rule 16. This Court has on innumerable occasions held this to be in order and, indeed, it is the admirable practice of many legal practitioners invariably to include this ground.

The two documents reproduced *supra* rank as no more than notifications of an intention by the defendant Wilhelmina to note an appeal though she did not elucidate what right of appeal she possesses in the matter of the interpleader action.

In the circumstances outlined above the document of 24th October, 1966, lodged on 25th October, 1966, cannot serve as a peg on which to hang a document dated 25th November, 1966, which reached the Clerk of Court, Warmbad, on 29th November, 1966, having been received in the Bantu Affairs Commissioner's office on 28th November, 1966, and which was stamped 76 cents on 12th December, 1966.

This document reads as follows:—

" *Amended Notice of Appeal.*

Be pleased to take notice that at the hearing of the appeal application will be made to amend the Notice of Appeal dated the 24th October, 1966, to incorporate the following:

'Appellant hereby appeals against the whole of the judgment delivered by the Native Commissioner on the 27th October, 1966, in that the Court erred in finding that in law:—

(*a*) Appellant was obliged to pay the debts of his mother;

(*b*) That the Plaintiff Samuel Maluleka had any right to claim payment for this amount from Appellant's mother;

(*c*) That the Appellant, Rubin Makubela is, as head of the household, obliged to pay the debts of his mother.' "

This document merely adds to the confusion. It seeks to amend a valueless and invalid document and, furthermore, seeks to introduce a second Appellant *viz.* Rubin Makubela. As an application it should have been stamped 10 cents *vide* Annexure, Table A, Item 4 of the Appeal Court Rules and its present stamping does not serve to validate the document of 24th October, 1966.

Even if it were accepted as a Notice of Appeal as urged by Mr. Kangisser it could only be regarded as having been duly lodged on the 12th December, 1966. In terms of Rule 4 an appeal from the Court of a Bantu Affairs Commissioner must be lodged within twenty-one days after the date of such judgment and this paper was lodged 56 days thereafter.

It could only be considered after an application (Rule 14) for and grant of condonation (Rule 4).

The application of 25th November, 1966, lodged with the Clerk of Court, Warmbad, on 16th February, 1967, serves no purpose in the circumstances. Judgments of Courts of Bantu Affairs Commissioners may be attacked only by way of appeal or review and according to the published rules.

In passing, I would remark that the description of Rubin Makobela in this last application. as both Interpleader Plaintiff and Defendant makes strange reading.

Rubin Makubela (Makobela) is not without remedy. He may, if he deems fit, lodge a proper notice of appeal in his own name as Appellant duly supported by a proper application for condonation with a deposit by himself as security.

This matter is not properly before this Court and must be struck off the roll with costs.

Gafney and Jansen, Members of the Court, concurred.

For Appellant: Adv. B. Kangisser i.b. Solomon Goss, Johannesburg.

For Respondent: Adv. L. P. C. Harms i.b. F. Herman & Oberholzer, Warmbad.

NORTH-EASTERN BANTU APPEAL COURT.

CATHERINE DHLAMINI vs. SARAH MAHAYE.

B.A.C. CASE NO. 30 OF 1967.

Eshowe: 4th July, 1967, before Craig, Acting President, and Harvey and Fenwick, Members of the Court.

REVIEW.

Review—when irregularity comes to notice of applicant—time limit for notice of review—substantial prejudice—interests of justice—invocation of section 15 *of act* 38 *of* 1927.

Summary: Plaintiff sued for and was awarded R10 damages in a Chief's Court. On appeal on 29th December, 1966, the Bantu Affairs Commissioner refused leave to appeal and in addition dismissed the appeal. In an application for review the applicant (Defendant) stated that on 16th February, 1967, she noticed that there had been a grave irregularity in that the Bantu Affairs Commissioner had refused leave to appeal because her claim was R10.

Held: That the Commissioner's refusal had occurred on 29th December, 1966, in applicant's presence and the application for review should have been lodged within fourteen days after that date.

Held: The Commissioner had not been guilty of improper conduct but rather of an error of judgment or ignorance of the law regarding the appealability of certain Chiefs' courts judgment.

Held: That applicant's application for review should be refused.

Held: That though applicant could still have recourse to an appeal she had suffered substantial prejudice as a result of the Commissioner's judgment, that the cause of action was so trivial that she should not be put to further expense and that the provisions of section 15 of act 38 of 1927 should be invoked, albeit with reluctance.

Cases referred to:

Nyathi vs. Silubane 1957 N.A.C. 153 (N.E.)

Kekana vs. Mokgoko 1953 N.A.C. 200 (N.E.)

Monnagotla vs. Pitje 1958 N.A.C. 82 (N.E.)

Madona vs. Pitso (1942 N.A.C. (N. & T.) 55

Matonsela vs. Matonsela 1952 N.A.C. 257 (C.).

Works referred to:

"A Digest of S.A. Native Civil Case Law" by H. W. Warner, paras. 275 (Supplement), 4337, 4345.

Authorities referred to:

The Bantu Administration Act No. 38 of 1927 sections 12 (4), 15.

Bantu Appeal Court Rules 22.

Appeal from the Court of the Bantu Affairs Commissioner, Nkandla.

Craig, Permanent Member:

This case had its inception in a Chief's Court where Plaintiff (now Respondent) sued Defendant (now applicant) for R10 damages" in that Defendant sued Plaintiff wrongly wasting her time to perform her domestic duties". Defendant denied liability and the Chief awarded Plaintiff the damages claimed with costs.

On appeal to the Bantu Affairs Commissioner's Court the following judgment appears in the body of the record "Leave to appeal is refused and the appeal is accordingly dismissed with costs", while in the appropriate place on the cover (B.A. 253) of the record appears a judgment of "The appeal is dismissed with costs". The first judgment was given by the judicial officer in his capacity of Bantu Affairs Commissioner and the second in his capacity of Magistrate. Both judgements were given on 29th December, 1966. It will be presumed that the judicial officer inadvertently described himself as "MGTE" (Magistrate) in which capacity he had no jurisdiction but such inadvertence must be guarded against.

The Defendant filed a "Notice of Application" for review of the proceedings of the Bantu Affairs Commissioner's Court supported by an affidavit in which she alleges that on 16th February, 1967, she "noticed that there was a grave irregularity" and it appears that such irregularity was "That if my memory serves me well on the day of the hearing of the appeal the learned Bantu Affairs Commissioner refused leave to appeal on the grounds that the claim was not appealable as the claim in dispute was R10".

In terms of Bantu Appeal Court Rule 22 notice of review "shall be given within 14 days after the irregularity or illegality complained of has come to the notice of the applicant". She was present at the hearing on 29th December, 1966, when the alleged irregularity occurred and notice should have been given within fourteen days after that date *vide Nyathi vs. Silubane* 1957 N.A.C. 153 (N.E.). For this reason alone her application must fail as it was hopelessly out of time (see *Kekana vs. Mokgoko* 1953 N.A.C. 200 (N.E.) (Warner 4345) and *Monnakgotla vs. Pitge,* 1958 N.A.C. 82 (N.E.) (Warner's "Supplement" paragraph 275). Her proper course would have been to lodge an appeal against the judgement, supported by an application for condonation of the late noting. Furthermore, mere errors of judgment would not be "grave irregularities" or "illegalities". If it is correct that the Commissioner refused leave to appeal because the value of the claim was R10 this would be an error of judgment or indicate a lack of awareness of the provisions of section 12 (4) of act 38 of 1927 (The Bantu Administration Act, 1927) which inhibit, in certain circumstances, the right of a party to appeal against a Chief's Court judgment where the value of the claim *is less than* R10. The record is silent as to the Commissioner's reasons for refusing leave to appeal and he apparently overlooked the requirement laid down in the case of *Madona vs. Pitso,* 1942 N.A.C. (N. & T.) 66 (Warner 4337) that "the Native Commissioner *shall put up a replying affidavit together*

with his reasons for judgment" with an application for review. There is no suggestion of improper conduct by the Commissioner in this matter *vide Matonsela vs. Matonsela* 1952 N.A.C. 257 (*c*).

In the circumstances outlined above the case is not reviewable at the instance of applicant and her application must be refused, with costs.

With reluctance bacause the Defendant is not without remedy by way of appeal but because she was wrongly advised by an unversed person to proceed by way of review and in order to save one or both parties further fruitless expense in respect of what appears to be a trivial matter this Court will invoke the provisions of section 15 of Act 38 of 1927, *supra* in terms of which a Bantu Appeal Court has "full power to review, set aside, amend or correct any order, judment or proceeding of a Bantu affairs Commissioner's Court" where it appears "that substantial prejudice has resulted therefrom".

There are defects in the instant proceedings in that (1) no reason has been forthcoming for the refusal of leave to appeal and, indeed, *ex facie* the record there seems to be none and (2) two judgments have been given and it appears to me that it was impossible to dismiss the appeal when leave to appeal had already been refused.

In my view the Applicant/Defendant has, in the light of all the remarks *supra,* suffered substantial prejudice and "the interests of justice" *vide* section 15, *supra* require that the multiple judgments given be set aside and the case remitted back to the Commissioner's Court for hearing.

Harvey and Fenwick, Members, concurred.

For applicant: In person

For respondent: In person.

NORTH-EASTERN BANTU APPEAL COURT.

DLABANTU NXUMALO vs. MAHLATHINI MBUYAZI.

B.A.C. CASE NO. 52 OF 1967.

Eshowe: 6th July 1967 before Craig, Acting President, and Harvey and Fenwick, Members of the Court.

BANTU LAW.

Damages—adultery—abduction—costs of appeal—late noting—condonation.

Summary: A Chief awarded Plaintiff damages and the Bantu Affairs Commissioner confirmed his judgment. The claim was based on allegations that Defendant took Plaintiff's wife and kept her at his kraal and stayed with her there. The wife concerned had left Plaintiff and returned to her people permanently.

Held: That a claim for damages for adultery was incompetent.

Held: That there was no evidence that Defendant had abducted the wife or induced her to leave Plaintiff.

Held: That Defendant had no knowledge that the woman concerned was, in fact, married.

Cases referred to:

Quabe vs. Sebande 1930 N.A.C. (N. & T.) 6.

Authorities referred to:

Natal Bantu Code, sections 138, 140.

Craig, Acting President:

In a Chief's Court Plaintiff (now Respondent) sued Defendant (now Appellant) "for taking my wife and keeping her at his kraal" and the Chief awarded him damages. In the Court *a quo* he amplified his claim by saying that Defendant "took my wife and *stayed with her* in his kraal". This clearly suggests that the woman concerned viz. Masondo, whom Plaintiff stated was his customary union wife, and Defendant came together for an immoral purpose. Indeed, Defendant testified that he and Masondo had sexual relations. But for the amplification and because of the omission in the Chief's statement of the claim of an allegation of unlawfulness I would have serious doubts as to whether such claim disclosed any cause of action *vide Quabe vs.* Sebande 1930 NAC. (N. & T.) 6 (Warner paragraph 1614). By alleging that Defendant *took* and *kept* Masondo at his kraal it might well be that Plaintiff meant to indicate that this was done for an immoral purpose and it will be presumed that the Chief regarded the claim as being based on an unlawful association otherwise he would not have awarded damages, though he did not mention it in his reasons for judgment.

It is common cause that Masondo had left Plaintiff and was living with her parents though the reason therefor was not forthcoming and there was nothing to suggest that her absence from Plaintiff's kraal was of a temporary nature. That being so a claim by Plaintiff for damages for adultery was precluded by section 138 of the Natal Bantu Code. There is nothing on record to indicate that Defendant had abducted Masondo or that he had induced her to leave her husband's kraal in the first place *vide* section 140 of the Code. No action by Plaintiff is tenable under this section.

It is not really necessary to say any more on the matter as the appeal must be upheld in the light of the legal points *supra* but I point out that the evidence does not support the judgment. Presuming for the moment that there was no legal bar to the claim it would have been for Plaintiff to prove, *inter alia,* that Defendant knew Masondo was a married woman. He (Defendant) denied it and stated that he had never been told so. Later he stated that Masondo's people demanded lobolo from him. These statements stand unrefuted and must be accepted as proof that he had no guilty knowledge. The Commissioner made much of Masondo's lack of virginity. This lack does not point unequivocally to matrimony but could indicate concupiscence and resultant promiscuity.

Mnunuzi the father of Masondo stated that he slaughtered a beast at Defendant's kraal "so that the woman can be freed to do duties in Defendant's kraal". He did not explain what she had to be freed from and that point was not probed.

Finally, and in passing, because of Mnunuzi's actions and his statement that his son Mhlekwa is the guardian of Masondo and the demand for lobolo the Commissioner should have had doubts on the point of whether a customary union did actually exist between Plaintiff and Masondo despite the unrefuted evidence that it did exist and should have caused the customary union register or a certified copy of the appropriate entry to be put in as an exhibit. If the union does exist no one but Plaintiff was Masondo's guardian.

The appeal in this case was more than two months out of time. The lateness was due to lack of funds and Defendant's apparent dilatoriness. His excuses are unacceptable. It was obvious, however, that the appeal must succeed and in the circumstances condonation of the late noting was granted but Defendant must bear the costs of the condonation application.

The Commissioner made no order regarding the costs of appeal in his Court. He is required to do so and should guard against the omisson in future.

The appeal is allowed with costs and the Bantu Affairs Commissioner's judgment is altered to read "The appeal is allowed with costs and the Chief's judgment is altered to read". For Defendant with costs".

Harvey and Fenwick, Members of the Court, concurred.

For Appellant: Mr. S. H. Brien i.b. Davidson & Schreiber, Empangeni.

For Respondent: In person.

NORTH-EASTERN BANTU APPEAL COURT.

IDA MBENSE vs ALFRED KHANYILE.

B.A.C. CASE NO. 16 OF 1967.

Pietermaritzburg: 21st August, 1967, before Yates, President, and Craig and Van Wyk, Members of the Court.

BANTU LAW (NATAL).

COMMON LAW.

*Damages—bearing of illegitimate children—Bantu female in Natal—*locus standi *to sue unassisted.*

Summary: The Bantu Affairs Commissioner ruled that the Plaintiff is, under Natal Bantu law, a perpctual minor and cannot sue unassisted under Bantu or common law and interrupted the proceedings and entered an absolution.

Held: That at the stage reached the judicial officer was not in a position to decide what system of law should be applied.

Cases referred to:

Bujela vs. Mfeka 1953 N.A.C. (N.E.) 119.

Kunene vs. Kunene 1953 N.A.C. (N.E.) 163.

Kanyile vs. Mabanga 1964 N.A.C. (N.E.) 14.

ex parte Minister of Native Affairs *in re Yako vs. Beyi* 1948 (1) S.A. 388 (A.D.)

Authorities referred to:

Natal Bantu Code secs. 27 (2), 144 (2).

The Bantu Administration Act No. 38 of 1927 sec. 11.

Works referred to:

"Principles of Native Law and the Natal Code" by Stafford & Franklin.

"A Digest of S.A. Native Civil Case Law" by H. W. Warner.

Appeal from the Court of the Bantu Affairs Commissioner, Pietermaritzburg.

Yates, President:

Plaintiff, a Bantu spinster over the age of twenty-one sued Defendant for—

(*a*) R300 being for general damages for pain and suffering and disgrace of giving birth to three illegitimate children;

(*b*) R150 being for damages for breach of promise to marry;

(*c*) R6 per month being maintenance for each child until the children reach the age of 18 years as from the date of issue of this summons;

(*d*) Costs of suit.

Defendant admitted paternity of the children and averred that he did maintain them. He denied that Plaintiff had suffered damages.

After Plaintiff had given evidence to the effect that she had given birth to three children of whom Defendant was the father and without Defendant apparently having had an opportunity of cross-examining her the Acting Additional Bantu Affairs Commissioner granted an absolution judgment and ordered Plaintiff to pay the costs.

Against this judgment an appeal has been brought on the grounds—

> "That the learned Bantu Affairs Commissioner erred in law in holding that the Plaintiff had no *locus standi* to sue unassisted."

The Commissioner based his judgment on the fact that in his opinion as the Plaintiff is a Bantu female domiciled in Natal she is a minor and as such would require the assistance of a guardian or a curator *ad litem* to institute an action of this nature. This view would be entirely correct if the action was governed by Bantu law—see page 211 of the Natal code of Native Law by Stafford and Franklin, but if Common Law were to be applied then a Bantu woman can sue for damages for seduction—See pages 8, 62 (paragraph 14) and 234 of the above-mentioned publication and the authorities there cited and also *Bujela vs. Mfeka* 1953 N.A.C. 119 N.E.

The Commissioner has stated in his reasons for judgment that a Bantu female in Natal could sue or be sued unassisted if common law was to be applied" and it is true that section 27 (2) of the Code provides that a Bantu female is "deemed to be a perpetual minor in law and has no independent powers save as to her own person and as specially provided in this code". Here it could well be argued that a claim for damages for seduction related essentially "to her own person" in which case of course she would have *locus standi* to institute an action. However, even if that were not so the opinion has been expressed that section 27 (2) of the Code can only be involved if and when an action arising out of Bantu Law is dealt with—see *Kunene v. Kunene* 1953 N.A.C. 163 (N.E.) at pages 164/5; and *Kanyile vs Mabanga* 1964 N.A.C. 114 N.E. where it was held that a woman's capacity to sue for damages for seduction is governed by section 11 (3) of Act 38 of 1927 and further that the Code does not in any way affect her capacity nor is the action brought by her governed in any way by Bantu Law. In this connection attention is directed to section 144 (2) of the Code which provides that nothing therein shall be deemed in any way to affect or impair the operation of section eleven of the Act.

The Commissioner was not in a position to give a judgment in this matter until he had decided which system of law to apply and in cases such as this he is vested with a discretion to apply either the Common Law or Bantu Law and it is his duty to exercise that discretion judicially i.e. as the circumstances of each particular case may dictate, on the basis of which system of law it would be fairest to apply in deciding the case between the parties concerned, *vide ex parte* Minister of Native Affairs *in re Yako v. Beyi* 1948 (1) S.A. 388 A.D. See also summary in Warner's Digest of S.A. Native Civil Case Law at para. 4394. Once the system of law is decided upon this will determine questions of capacity in relation both to the party in whom the right is or is claimed to be vested and to the party on whom the obligation rests or is alleged to rest.

The appeal is therefore allowed with costs. The judgment of absolution from the instance with costs is set aside and the case remitted for further hearing.

Craig and Van Wyk, Members, concurred.

For Apellant: Mr. C. S. Ntloko i.b. L. A. Tod & Co., Pietermaritzburg.

For Respondent: In person.

NORTH-EASTERN BANTU APPEAL COURT.

KENNETH NXASANA vs. JOTHAM NXASANA.

B. A. C. CASE NO. 47 OF 1967.

Pietermaritzburg: 21st August, 1967, before Yates, President, and Craig and Van Wyk, members of the Court.

EJECTMENT.

Ownership—testamentary succession—late noting of appeal—condonation—higher costs.

Summary: Plaintiff succeeded to the ownership of certain land by virtue of his grandfather's will. His ownership was a qualified one personal to him in that he could not dispose of the property by any means or encumber it. He was awarded an order of ejectment against Defendant and the latter appealed on the grounds that Plaintiff had no *locus standi* to sue, that he was not the owner, that the will conferred no *jus in rem* upon him and that the Bantu Affairs Commissioner had no right to decide that a condition of the will was binding on Defendant.

Held: That Plaintiff is, in terms of the will, the owner for the time being of the land in question and, so, has the necessary *locus standi in judicio.*

Held: That Plaintiff's ownership is a qualified one and personal to him.

Cases referred to:

Mahlatsi vs. Majola 1959 N.A.C. 78 (C).

Batelo vs. Vapi 1957 N.A.C. 74 (S).

Mabele vs. Pungula & others 1952 N.A.C. 48 (N.E.)

Statutes referred to:

Deeds Registries Act No. 47 of 1937, Section 16.

Rules referred to:

Bantu Appeal Court Rules, Annexure Table B, items (4) and (5).

Appeal from the court of the Bantu Affairs Commissioner, Ixopo.

Craig, Permanent Member:

Plaintiff, now Respondent, sued in the Bantu Affairs Commissioner's Court for an order of ejectment against Defendant, now Appellant, and all his dependants and the residents of his kraal from a certain property described as the Remainder of Lot F.E. No. 2921 in the district of Ixopo. He gave various grounds for ejectment all of which were denied by Defendant in his plea. He alleged further that in terms of the will of his late grandfather Timba Mpande he is the owner for time being and in lawful possession and control of the property and that Defendant as a resident on the farm owes him allegiance. These assertions were also denied by Defendant.

On 10th February, 1967, the Commissioner granted the order of ejectment sought and an appeal by means of an unstamped notice was lodged timeously on 20th February, 1967. Such notice was, however, void *vide Mahlatsi vs. Majola* 1959 N.A.C. 78 (C) (Warner's "Supplement" paragraph 29) and was not validated until 23rd May, 1967, on which day the appeal was accordingly, properly noted.

An application for condonation of the late noting of the appeal was lodged and the grant thereof was opposed by Mr. Niehaus. It seems that the failure to stamp the notice of appeal was due to inadvertence on the part of the Defendant's attorney and it is something which should be guarded against. The Court requested Counesel to proceed with their arguments on the merits and reserved its decision on the condonation application. Eventually and for the reasons given in *Batelo vs. Vapi,* 1957 N.A.C. 74 (5) the application for condonation was granted with the proviso that the applicant should pay the costs thereof himself.

The grounds of appeal are as follows:—

"The learned Bantu Affairs Commissioner erred in law in the following respects—

(*a*) in holding that the Plaintiff had *locus standi in judicio* to sue the Defendant for ejectment; and in particular in holding that the Plaintiff was the owner, whether for the time being or at all, of the property in question;

(*b*) in holding that the said will conferred a *jus in rem* in the property in question upon the Plaintiff, and

(*c*) in purporting to decide that condition No. 4 of the said Will was valid and binding on the Defendant".

The property concerned is an extent of land of some 300 acres and was the property of one Timba Mpande who, by will, bequeathed the property to his son in his first house, viz. Jeremiah Nxasana. No explanation of the difference in surnames (isibongos) was forthcoming but in the absence of dispute it will be presumed that Nxasana is the "isitakazela" of Mpande, in short, that they are synonymous, Jeremiah predeceased Timba and his (Jeremiah's) heir is the present Plaintiff.

The bequest of all "right, title, claim and demand in and to" the property was subject to the following terms and conditions viz.

"1. That he shall not sell, lease, mortgage or in any other way alienate or encumber the said farm during his lifetime.

2. That the said farm shall upon his death devolve upon the general heirs of succeeding generations, for such number of generations as fixed by law and likewise be subject to the same restrictions as to alienation as hereinbefore set out.

3. That all the descendants of my three (3) wives shall have the right to reside on the said farm Lot F.E. No. 9221 free from the obligation of paying rent for residing thereon. They shall be awarded reasonable ploughing land or fields by the owner from time to time to enable them to maintain themselves.

4. That all persons living on the said farm shall be subject to the control and instructions of the owner for the time being in regard to all matters appertaining to the said farm and they shall be obliged to obey his lawful orders or instructions. In the event of any person disobeying such lawful orders or instructions given by the owner for the time being of the said farm, then the owner shall have the right to eject any person and his dependants who shall be proved, in any Court of competent jurisdiction, to have disobeyed such owners lawful order or instructions."

The will remained unaltered and it is clear from paragraph 2 that on the death of Timba on 20th December, 1944, the ownership of the property devolved on Plaintiff. Mr. A. L. Bulcock, an attorney of Ixopo, was appointed as Executor Dative on the failure, due to his death, of Jeremiah to assume the position of executor testamentary and he duly distributed the property to Plaintiff subject to the restrictions, none of which is suspensive, regarding, *inter alia,* disposal, encumbrance and the rights of others to live on the property. The latter, including Defendant, are themselves subject to the control of the owner for the time being and must obey his lawful orders under pain of ejectment.

In terms of the will which terms are clear and unequivocal, Plaintiff is the owner for the time being of the property despite the provisions of Section 16 of the Deeds Registries Act of 1937 (Act No. 47 of 1937) and the arguments of Mr. Menge that he is no more than a usufructuary or the rather startling one that Mr. Bulcock is the owner for the time being. Plaintiff's is a qualified ownership and it is personal to him. On his death it devolves further in accordance with the provisions of the Late Timba's will. The case of Mabele vs. Pungula and others 1952 N.A.C 48 (N.E.) quoted by Mr. Menge is not apposite as in that case the Plaintiff failed to establish his ownership whereas in the instant case ownership is established by the will.

In these circumstances the appeal on grounds (*a*) and (*c*) must fail. Ground (*b*) appears to be of mere academic interest and cannot affect the appeal one way or the other. It will, accordingly, not be discussed.

Both counsel were of the opinion that the higher costs provided for the Rules should be authorised by this Court. Neither, however, advanced any cogent reason *vide* the notes on items (4) and (5) in Annexure, Table B of the Bantu Appeal Court Rules justifying an increased award.

In the result the appeal is dismissed with costs.

Yates, President, and Van Wyk, Member, concurred.

For Appellant: Adv. W. O. H. Menge i.b. Leslie Simon & Co., Pietermaritzburg.

For Respondent: Adv. J. H. Niehaus i.b. H. L. Bulcock, Ixopo

NORTH-EASTERN BANTU APPEAL COURT.

ZACHEUS MACK GUMEDE, OBED NXUMALO, OBED MNGUNI vs. LANCELOT PETER MSOMI.

B.A.C. CASE NO. 38 OF 1967.

Pietermaritzburg: 22nd August, 1967, before Yates, President and Craig and Van Wyk, Members of the Court.

COMMON LAW.

Illegal occupation of private trust land—existence of lease—qualifications of signatories thereto—validity of lease—rental.

The reader is referred to the full text of the judgment below.

Cases referred to:

Bhibajee vs. Southern Aviation (Pty) Ltd., 1949 (4) S.A. 105 (E.D.L.D.)

National and Overseas Distributors vs. Potato Board 1958 (2) S.A. 473.

Works referred to:

"Landlord and Tenant in South Africa" by Wille, 3rd edition, page 18.

Appeal from the Court of the Bantu Affairs Commissioner, Newcastle.

Yates, President:

Plaintiffs (now Respondents) in their capacity as Trustees of the Blaauboschlaagte Trust, sued the Defendant (now Appellant) for an amount of R1,750 alleging that—

> "On or about the 1st day of October, 1952, the Defendant unlawfully and without the consent of the lawful Trustees of the Blaauwboschlaagte Trust, occupied the premises at present known as Vasumuzi Store, situated on the Remainder of Blaauwboschlaagte No. 8892, the property of the Trust.
>
> The value of the said occupation is the sum of R150 per annum.
>
> The Trust has suffered damages in the sum of R1,750 as a result of the said unlawful occupation by the Defendant, made up as follows:

	R	R
To occupation for 13 years .. R150 p.a.....		1,950
Less paid 1964.....	150	
Less paid 1962.....	50	
To balance due.....	1,750	
	R1,950	R1,950

Alternatively Plaintiff alleged that:—

> "During or about 1952 the Defendant was granted a lease to occupy certain premises on the Remainder of Blaauwboschlaagte at a rental of R150 per year, payable yearly in advance.
>
> During the past 13 years Defendant has only paid the sum of R150 for the year of 1964 and R50 on account during 1962, and owes the balance of R1,750, which amount, despite demand, the Defendant fails and neglects to pay".

Defendant pleaded specially that Plaintiffs were not Trustees of the Trust and had no *locus standi* in the matter. However this plea was dismissed and does not form any part of the subsequent record. Defendant denied the allegations contained in the main claim and in the alternative admitted that a lease had been entered into but put Plaintiffs to the proof that the rental was R150 per year.

The Commissioner gave judgment for Plaintiffs for R1,100 plus costs.

Defendant appealed against this judgment on the grounds that:—

"1. The Bantu Commissioner erred in holding that it was not necessary for him to determine by what right the Appellant obtained occupation.

2. (*a*) The Bantu Commissioner erred in holding that the Agreement of Lease, Exhibit "H", was *ab initio* not valid.

(*b*) The Bantu Commissioner misdirected himself in findind that the law of agency applied to the signing of the Agreement of Lease, Exhibit "H". Although there was evidence that Makaya and Tsongwe were not Trustees when they signed the Agreement of Lease, there was no evidence to show that by virtue of the provisions of paragraph 3, page 4, of Exhibit "A", Trustees Mnguni and Mkwanazi did not give them power and authority to act for them on this specific day.

3. The Appellant was never informed that the Agreement of Lease was either cancelled or disputed and the moneys accepted as rental during 1962 (sic) and 1964 were accepted as performance under the Agreement of Lease.

4. The Bantu Commissioner erred in his finding that the apparent intention of the parties who drew up the Trust Deed was to the effect that all three Trustees must have acted together in signing the Agreement of Lease. Appellant contends that two signatures were sufficient to properly execute the Agreement of Lease, and that the doctrine of estoppel operates in the Appellant's favour.

5. The Bantu Commissioner should have held that Appellant contracted with the Trustees to pay R60 per year and should not have found or been influenced by rentals payable to the Trustees by their Lessees. Appellant contends that he is liable for the amount of R690, plus costs to date of judgment by the Bantu Commissioner".

Plaintiff has noted a cross-appeal on the grounds that:—

"The Bantu Commissioner erred in finding that the rental and or value of occupation was not R150 per annum in that the only evidence before the Bantu Commissioner was that of the Plaintiff's witnesses and that his finding was therefore against the weight of evidence."

As pointed out by Mr. Menge who appeared on behalf of the Defendant, the Plaintiffs in their alternative claim (which is completely inconsistent with the main claim) alleged that during or about 1952 Defendant was granted a lease to occupy premises at a rental of R150 per annum. Defendant in his plea to this alternative claim admitted that a lease was granted to him but put Plaintiffs to the proof of the amount of the rental so that at that stage he only point in issue was apparently the amount of the rental.

Mr. Van Rensburg, however, who appeared on behalf of the Plaintiffs contended that no valid lease existed, that Defendant occupied the property unlawfully and that the Commissioner was correct in awarding a reasonable amount for the use and occupation of the property.

It seems to me to be necessary to decide by what authority Defendant occupied the property. Zacheus Gumede, one of the three trustees, admitted that in 1952 a resolution was passed giving occupation to Defendant but stated that a further meeting was to be called later in the year to consider the matter further. In his evidence he referred on several occasions to an agreement of lease with Defendant which he had heard about but had never seen. When confronted with the "Deed of Lease" Exhibit "H" he stated that he was convinced that it had been entered into at a private meeting and not at a recognised official meeting but he brought no evidence to corroborate his statement nor was any attempt apparently made to comply with the "best evidence" rule and produce the original minutes of meeting.

As pointed out by Mr. Menge, the Deed of Lease on the face of it is perfectly valid. It was properly drawn up by a firm of attorneys, Messrs Anderson and Edmonds who acted on behalf of the Trust, and was duly stamped. It was signed on 21st November, 1953, by John Makaya and Stephen Shangwe "in their capacity as Trustees of the Remainder of Blaauwboschlaagte... (hereinafter with their successors in title referred to as the "lessors")" and by the Defendant. On the same day Obed Mnguni, who gave evidence and Joseph Mkwanazi signed an addendum to the Deed of Lease to the effect that they had been duly appointed as Trustees to the Board of Trustees of the remainder of Blaauwboschlaagte and ratified "the lease entered into between John Makaya and Stephen Shongwe in their capacities as Trustees on the one fact" and Defendant on the other.

Mr. Van Rensburg contended that Makaya and Shongwe had entered into the contract in their private capacities and that the Board of Trustees could therefore not ratify it but is is clear from the whole tenor of the document and the surrounding circumstances that they signed the lease on behalf of the Trust.

In his evidence Obed Mnguni stated that he had signed the addendum to the lease without any knowledge of its contents as he could not read and the document had not been interpreted to him but even if this were so he is bound by his signature—see *Bhikhajee v. Southern Aviation (Pty) Ltd* 1949 (4) S.A. 105 E.D.L.D. The Commissioner held that the lease was invalid because, *inter alia,* in any event only two competent Trustees had signed whereas in his opinion the Trustees should act together. However, no evidence to that effect was produced to the Court and it must be accepted that where three Trustees only are appointed two of them, in the absence of a specific provision to he contrary, must be able to bind the other one. There was also what Gumede called "a Committee of Syndicate" but its powers were not clarified and in view of the provisions of para. 3 of the "Deed of Trust" set out in the Commissioner's reasons for judgment (the document itself was not before this Court) i.e.

"The Trustees have authority and power to manage and control the trust property, *inter alia,*

(*a*) to let and hire any portion of the Trust property at such rentals and on such terms and conditions as they may deem advisable, to sign and execute any agreement of lease, to cancel any lease or tenancy and to collect and receive rents . . .

it must be accepted that the power vested in the Trustees and not in the Committee.

That there was a valid deed of lease therefore seems clear but even if there was not the Defendant had every right to believe that there was. He had been allowed to occupy the property in 1952 and erect premises. He held a document which on the face of it was clear and unambiguous and gave him a lease over the property for 9 years and 11 months at a yearly rental of £30 (R60) payable in arrear on the last day of January of each and every

year. It was signed by persons who were the trustees and therefor vested with the power to sign so that as far as he was concerned it was a contract binding on the Trustees. See *National and Overseas Distributors v. Potato Board* 1958 (2) S.A. 473 at page 480 (A.D.)

Furthermore two amounts of R150 and R50 respectively had been accepted by Messrs. Anderson & Edmonds on behalf of the Trust as rent *vide* paragraph 2 of the "further particulars" where Plaintiff stated that this was so. The first amount according to Gumede was paid in 1953 or 1954 and the second according to the Trust Account, Exhibit "G", in 1962; so that Defendant was justified in concluding that even if the original lease had been invalid it was subsequently ratified. See Landlord and Tenant in S.A. by Wille, Third Edition, at p. 18.

It follows then that the amount of rent to be paid is governed by the terms of the lease viz. R60 a year. Defendant, at the close of the case in the Bantu Affairs Commissioner's Court, tendered R690 towards rent. It is not clear how this amount was arrived at and in the absence of any explanation this Court is not prepared to alter it.

The appeal therefore is allowed with costs. The judgment of the Bantu Affairs Commissioner's Court is set aside and for it is substitued "For Plaintiffs for R690 and costs to date of judgment".

The cross-appeal is dismissed with costs.

Craig and Van Wyk, Members, concurred.

For Appellant: Adv. W. O. H. Menge i.b. Anderson & Edmunds, Newcastle.

For Respondent: Adv. J. van Rensburg i.b. M. J. van Lingen & Co., Newcastle.

NORTH-EASTERN BANTU APPEAL COURT.

FANISHON GWALA vs. ARCHIBALD BOYICE.

B.A.C. CASE NO. 41 OF 1967.

Pietermaritzburg: 25th August, 1967, before Yates, President, and Craig and Van Wyk, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal—grounds—amendment thereof—timeousness of application—inadequacy of reasons for judgment—handwriting—comparisons—danger inherent therein—probability of error— prima facie *case not established.*

Summary: The reader is referred to the full report of the judgment.

Cases referred to:

Lambert vs. The State 1962 (1) P.H. H7 (N.P.D.).

Rex vs. Kumalo 1947 (4) S.A. 156 (N.P.D.).

Paras. 375, 467, 471 of Warner's "Digest of S.A. Native Civil Case Law".

Works referred to:

"S.A. Law of Evidence" by Hoffman, pages 182/4.

Rules referred to:

Bantu Appeal Courts, 14.

Appeal from the Court of the Bantu Affairs Commissioner, Pietermaritzburg.

Yates, President:

This is an appeal in a case in which Plaintiff (now Respondent) sued Defendant (now Appellant) for the return of a 1948 Oldsmobile, failing which payment of its value R365.45, damages in the sum of R100 and costs. He alleged that he had bought the body of an Oldsmobile car from Defendant for R70.00 and had paid R30, leaving a balance of R40 which he tendered; that he purchased parts to the value of R225.45 and at a further cost of R70 for labour converted the body into a motor vehicle No. N.P. 8544 which he valued at R365.45; and that Defendant subsequently caused the vehicle to be removed from his possession.

Defendant admitted selling the body to Plaintiff for R70 but alleged that R20 only had been paid and he counterclaimed for the balance of R50. He also alleged that he had sold an engine to Plaintiff for R28.00 and counterclaimed for this amount as well. He denied that he had caused the vehicle to be removed from Plaintiff's possession.

The Acting Additional Bantu Affairs Commissioner gave judgement "for Plaintiff for the return of one motor vehicle or its value R365.45, damages at R100 and costs. Plaintiff to pay Defendant R50.00". He made no finding in regard to the counterclaim for R28.00.

Defendant noted an appeal against that part of the judgment relating to the claim in convention and against the second part of the counterclaim on the grounds "that the judgment is bad in law and against the evidence and is not supported thereby".

In his argument, however, before this court, Mr. Moleko who appeared on behalf of the Defendant confined himself to the claim in convention.

At the outset Mr. Moleko applied to amend his grounds of appeal but as he had not complied with rule 14 of the Rules for Bantu Appeal Courts contained in Government Notice No. 2887 of 1951 which requires that applications must be filed not less than twenty-four hours prior to the commencement of the session his request was refused.

That portion of the appeal which stated that the judgment was bad in law was also struck out as it did not specify in what way it failed, *vide* the numerous cases cited in paragraph 375 of Warner's Digest of S.A. Native Civil Case Law.

Mr. Menge who appeared on behalf of the Plaintiff contended that an appeal solely on the ground that it was "against the weight of evidence" was insufficient and invalid. However, when a judgment is attacked on a question of fact the Bantu Appeal Court, in a series of decisions, has accepted such a ground as sufficient without requiring the specific points of evidence to be specified—see paragraph 374 of Warner's Digest.

Mr. Moleko relied solely on the ground that there was no evidence to prove that Defendant was responsible for the removal of the car and pointed out that in his "reasons for judgment", although the Acting Additional Bantu Affairs Commissioner found this as a proved fact he gave no reasons whatever for making such a finding.

The reasons for judgment filed by the Commissioner are grossly inadequate and consist only of four facts which he found had been proved. No attempt was made to set out why and on what grounds he came to these conclusions as he should have done—

see the cases quoted in paragraphs 467 and 471/2 of Warner's Digest. His "reasons" are therefore quite valueless to this Court in the absence of any explanation as to how he arrived at his findings.

The onus in this case rested on the Plaintiff and as pointed out by Mr. Moleko and conceded by Mr. Menge there was no evidence directly implicating the Defendant with the removal of the car. When Plaintiff went to Estcourt at the end of 1964 or the beginning of 1965 he left the car in the care of one Mbata and on his return the car was gone. No-one saw it go apparently but Mbata produced a note Exhibit "C", which he stated he had received from a neighbour, on his return home, purporting to be signed by Defendant, in which it was stated that he had taken the car.

At the close of Plaintiff's case the Defendant's attorney closed his case without leading any evidence in respect of the main claim. He proceeded however with the counterclaim.

Mr. Menge contended that a *prima facie* case had been made out and asked the Court to infer that the Commissioner had arrived at his finding that Defendant had removed the car by comparing the signatures on the note exhibit "C" and on the contract exhibit "A". Plaintiff stated that he had signed exhibit "A" but there is no evidence that Defendant did so and again this Court is asked to infer that the signature of the seller on that document is that of the Defendant. No mention was made of exhibit "B" in argument. It purports to be a receipt for £5 (R10) paid to Defendant by Plaintiff. Defendant in his evidence stated that he had given Plaintiff a receipt but here again no attempt was made to identify it as having been signed or written by Defendant. Nor was any attempt made to identify the handwriting on the note or on the other exhibits. There is nothing on the record to show that a comparison of the signatures was made at any time yet here this Court is asked to come to a conclusion by merely comparing one signature with another.

The dangers inherent in any attempt to identify handwriting by comparison with another specimen are set out at p. 182/4 of S.A. Law of Evidence by Hoffmann and in the case of *Lambert v. The State* 1962 (1) P.H. H. 7 (N.P.D.) in which the following excerpt from the case of *Rex v. Kumalo* 1947 (4) S.A. 156 (N.P.D.) was quoted with approval "It has often been said that it is just as dangerous for a judicial officer himself to play the role of a handwriting expert, and then to base his judgment on his own observations as it is for a judical officer to rely solely on the evidence of handwriting experts. The presence of common similarities which are found in many handwritings is the usual source of honest error in falsely connecting two handwritings. Writings which follow the same general style invariably show similarities and if similarities alone are searched for, as is often the case, an erroneous conclusion is not only possible, but probable".

It is true that in the instant case the signatures are similar but in view of the dangers pointed out above this Court declines to base a decision on this fact alone.

In the result the Plaintiff has failed to establish a prima facie case.

The appeal is allowed with costs and the judgment of the Bantu Affairs Commissioner's Court is altered to one of "Absolution from the instance with costs on the claim in convention, Plaintiff to pay Defendant R50.00".

Craig and Van Wyk, Members, concurred.
For Appellant: Mr. A. M. Moleko.

For Respondent: Adv. W. O. H. Menge i.b. Leslie Simon & Co., Pietermaritzburg.

NORTH-EASTERN BANTU APPEAL COURT.

**THANDIWE EUNICE MCUNU d.a. vs.
THANOSE ALLISON NGUBANE.**

B.A.C. CASE NO. 45 OF 1967.

Pietermaritzburg: 25th August, 1967, before Yates, President and Craig and Van Wyk, Members of the Court.

STATUTE LAW (NATAL.)

PRACTICE AND PROCEDURE.

Breach of promise to marry—evidence of promise must be corroborated—denial in plea—no sanction.

Only the relevant portion of the judgment in this case will be reproduced here.

Laws referred to:

Law No. 5 of 1870 (Natal).

Cases referred to:

Blesse vs. Brock 1948 (2) S.A.L.R. 756 at p. 758.

Craig, Permanent Member:

"In respect of the claim based on breach of promise to marry Plaintiff's evidence that the promise was made is sufficiently corroborated as is required by Section 2 of Law 5 of 1870 (Natal) (under the heading of "Evidence and Witnesses) by Defendant's failure to deny it in his testimony. His denial of it in his plea "has no sanction and, therefore, does not correspond to a denial on oath" *vide Blesse vs. Brock* 1948 (2) S.A.L.R. 756 at page 758.

Yates, President, and Van Wyk, Member, concurred.

For Respondent: Mr. C. S. Ntloko.

For Appellant: Adv. W. O. H. Menge.

NORTH-EASTERN BANTU APPEAL COURT.

**BONFAS MAJOLA vs. (1) MICHAEL SHANGE;
(2) MDODILE MTHIYANE.**

B.A.C. CASE NO. 24/67.

Durban: 5th September, 1967, before Yates, President, and Craig and Harvey, Members of the Court.

EVIDENCE.

MESSENGER OF COURT.

PRACTICE AND PROCEDURE.

Attachment—vindicatory action—disclosure of defence—ownership—illegality of attachment—possession passed to judgment creditor—messenger of court—damages.

Summary: Plantiff sued the Defendants for the return of cattle illegally attached and the possession of which had passed out of the hands of second Defendant who was a messenger of a Chief's Court. The question of ownership was raised by the pleadings. The legality of the attachment was highly questionable.

Held: That the evidence regarding ownership was so unsatisfactory and confused that the Plaintiff was not entitled to an outright judgment on the point.

Held: That a messenger of court may not be sued for the return of attached property which has passed out of his hands but may be sued for damages if he has acted illegally or negligently.

Authorities referred to:

"Principles of Native Law and the Natal Code" by Stafford and Franklin;

"The Civil Practice of the Magistrates' Courts of South Africa" by Jones & Buckle, 6th edition, at pages 513 and 537.

Appeal from the Court of the Bantu Affairs Commissioner, Umbumbulu.

Craig, Permanent Member:

Plaintiff (now Respondent) sued the two Defendants for the return of three head of cattle or their value R130, Defendant No. 1 being sued in his personal capacity and No. 2 in his capacity as a messenger of Chief Cele's Court. Plaintiff alleged, *inter alia,* that "5. In or about November, 1963, Defendants wrongfully, unlawfully and forcibly took possession of Plaintiff's three head of cattle valued at R130".

Defendant 1 denied the contents of this paragraph 5, *supra,* in his plea and then proceeded that the cattle were taken in execution of a judgment of Chief Mbuyiswa Mdabe and that such taking was, accordingly, lawful.

Defendant 2 pleaded that he had taken the cattle in his capacity as a tribal constable of Chief Mbuyiswa's Court and in execution of a judgment of that Court and that what he did was, accordingly, not wrongful and unlawful.

After hearing evidence, at which hearing neither party was legally represented, the Bantu Affairs Commissioner gave judgment of "For Plaintiff for the return of three head of cattle or their value R130 and costs against Defendant No. 1 and Defendant No. 2 jointly and severally, the one paying the other to be absolved.

An appeal against that judgment has been noted by Defendant No. 1, only on the following grounds:—

"1. The judgment was against the weight of the evidence, and the law.

2. The learned Magistrate should have believed the evidence of the 1st Defendant and his witnesses.

3. In any event, the learned Magistrate should have held that the Plaintiff had failed to establish his case and should have granted judgment for the 1st Defendant or alternatively should have granted absolution from the instance, in either case with costs.

4. In any event, the learned Magistrate should have held that the cattle in question were lawfully attached at the instance of one or both the Defendants in a case in which the Defendants sued Plaintiff's son Stanlas Majola on or about the 26th October, 1963, and obtained judgment against the Plaintiff's said son.

5. The learned Magistrate should have held that the Plaintiff was well aware of the said attachment and either expressly or tacitly acquiesced in the said attachment and in any event, that he failed to avail himself of the steps that he should have taken at that stage, including interpleader proceedings.

6. The 1st Defendant reserves the right to add to or amplify his grounds of appeal.
7. Security for costs in an amount of R15 is deposited into Court with this Notice which bears a Revenue Stamp to the value of 75c."

Ground 1 does not state in what respect the judgment is against the law so that portion will be struck out. Paragraphs 6 and 7 are not grounds of appeal at all. An Appellant cannot reserve the right to add to or amplify his grounds of appeal; he can only make changes on due application and with the leave of the Appeal Court.

Defendant No. 2 has not noted an appeal but nevertheless this Court is constrained to point out that as a messenger of a Court he may, if he has acted wrongfully or negligently "be sued for damages, but not for the property which has passed out of his hands" see "Principles of Native Law and the Natal Code" by Stafford & Franklin, Paragraph 1 dealing with Messengers of Court at pages 252-253. It transpired from the evidence that the property concerned in this case had passed out of Defendant 2's hands so a judgment for the return by him of this property was not competent. For the same reason interpleader proceedings were incompetent.

The Commissioner concerned himself unnecessarily with the question of whether or not Defendant No. 2 was, in fact, a messenger of the Chief's Court. In paragraph 4 of his summons Plaintiff conceded the point.

Mr. Noren, though he did not abandon any portion of the appeal confined his argument mainly to the question of the legality of the attachment while Mr. Thompson in addition to arguing on that point advanced submissions in respect of onus and ownership of the cattle concerned.

In paragraph 5 of the summons quoted *supra* Plaintiff alleged that his cattle had wrongfully, unlawfully and forcibly been taken possession of. Defendant in his plea denied this paragraph thus putting in issue two points viz:—

(*a*) Plaintiff's claim that he was owner of the cattle and

(*b*) that the attachment was illegal.

True, Defendant did not disclose in so many words that he proposed to endeavour to establish that he in fact was the owner and not Plaintiff, but evidence to that end was given without objection by Plaintiff in which connection see Jones & Buckle "The Civil Practice of the Magistrate's Courts of South Africa", 6th edition, at page 513 (ante-penultimate paragraph of the Notes) and also Note 96 at page 537.

These cattle were attached on the strength of a judgment for R30 given by a Chief against Plaintiff's son Stanlas. No order was made for the attachment of specific cattle. The record is silent as to whether the cattle were to be sold to raise an amount of R30 or whether Defendant was using the judgment to obtain possession of cattle which he regarded as his. The picture presented by the evidence seems to make it clear that Defendant had the latter object in view as the cattle are still running at his kraal.

In that case he should have sued Plaintiff for the return of cattle which, it seems, he claims to have been despoiled. A judgement against Plaintiff's son Stanlas for an amount of R30 does not provide the necessary legal sanction for the attachment in the circumstances outlined.

Plaintiff's action is a vindicatory one as it is based on ownership and as he fixed an alternative value of the cattle. He was aware from the pleadings, or should have been, that Defendant disputed his ownership and the onus was on him to prove that the cattle were his. In my view he did not discharge such onus.

He made the bald and uncorroborated statement that the cattle were his without, *inter alia*, giving information as to their origin. The value of the presumption of ownership in his favour arising from the fact that the cattle were attached in his possession was considerably diminished by certain factors viz. that it seems that cattle have shuttled between the parties more than once in the course of their long dispute and that though the catle were attached in November, 1963, it was not until March, 1966, that Plaintiff instituted this action. This suggests acquiescence for a time at any rate.

These circumstances inhibit an outright finding that the cattle are Plaintiff's.

It appears that Defendant contends that a cow was paid to him as seduction damages some years ago by Stanlas and that it has had two progeny. These three cattle may or may not be issue but no evidence positively identifying them with this action was forthcoming. Vague evidence regarding the movement of one or more beasts to and fro between "Shange's" and "Majola's" kraal was given by and for Defendant.

No descriptions of any of the cattle mentioned in this case were tendered by or elicited from either party to that even that link between them and this litigation was denied the Court *a quo* and this Court. The parties themselves probably knew what cattle they were talking about, the Commissioner possibly assumed that he knew but this Court is in the dark. The only thing which emerges with any clarity from this confusing and unsatisfactory evidence is that the ownership of the cattle attached is in dispute.

In these circumstances it is my view that the only possible judgment was one of absolution as neither party has, at this stage, established his contentions. I find it remarkable that Stanlas was not called to give evidence.

Had Plaintiff instituted a spoliatory action based on possession the result of this case might well have been different.

The appeal should be allowed with costs and the Bantu Affairs Ctmmissioner's judgment altered to one of absolution from the instance with costs.

Yates, President, and Harvey, Member, concurred.

For Appellant: Adv. D. Noren, Durban.

For Respondent: Adv. D. Thompson, Durban.

NORTH-EASTERN BANTU APPEAL COURT.

LILLIAN FLORENCE MAZIBUKO vs. ROBERT T. MAZIBUKO.

B.A.C. CASE NO. 54 OF 1967.

Durban: 6th September, 1967, before Yates, President, and Craig and Harvey, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal—disposal of only one aspect of cause of action—not countenanced.

Summary: Plaintiff sued for certain estate assets. During the course of the hearing the court, at request of both parties, gave a ruling on the validity of certain claims made by Defendant. This ruling was brought on appeal.

Held: That the Appeal Court would not countenance an appeal against a ruling which disposed of only one aspect of the cause of action.

Authorities referred to:

Warner's "A Digest of S.A. Native Civil Case Law" paragraph 337.

Appeal from the Court of the Bantu Affairs Commissioner, Durban.

Yates (President).

Plaintiff (now Respondent) a widow, sued Defendant, her brother-in-law (now Appellant) for an amount of R446.82 with interest thereon at rate of 10 p.a. from 4th July, 1949, to date of payment (limited to R446.82) alleging in her particulars of claim that she was a widow and heir to the estate of her late husband Simon James Wilfred Mazibuko; that Defendant was appointed by the Bantu Affairs Commissioner, Durban, as representative and administrator of the estate and during 1949 he received the proceeds of certain insurance policies and other monies which he has failed to hand to her.

Defendant admitted that he had been appointed to administer his brother's estate and pleaded that on 4th September 1964 he duly filed a Liquidation and Distribution Account in which he accounted for his administration of the deceased's estate and that there was no residue to which Plaintiff could succeed.

Plaintiff then asked for a copy of the Liquidation and Distribution Account which was duly furnished. Attached to this document was Annexure C which consisted of 12 items of expenditure amounting in all to R705.40. Items 1-9 amounting to R621.15 purported to be a claim by Defendant against his late brother's estate for boarding and school fees, pocket money, clothing etc. supplied by Defendant to Plaintiff's late husband during the years 1935 to 1943.

Defendant accepted the onus to begin and gave evidence. During his cross-examination his attorney informed the court that by consent the parties wished to confine the evidence at that stage to the validity of the claim for the items listed 1-9 in the Annexure C referred to above, as a decision in regard thereto might dispose of the whole issue. At the close of Defendant's evidence his attorney closed his case on Annexure C only and the matter was then argued. After a postponement the Commissioner ruled that "Items 1-9 in claim C annexed to Liquidation Account are not a valid claim against the estate. Defendant to pay costs of this matter.

The ruling disposed of that particular aspect of the matter only and the further issues have yet to be decided. Plaintiff for instance has not yet given evidence or attempted to establish her claim and it may well be that a final judgment will result in a further appeal.

This court will not countenance an appeal from a ruling which disposes of part of the cause of action only and parties should wait till the final stage before appealing *vide* the authorities quoted at paragraph 337 of Warner's Digest of S.A. Native Civil Case Law.

The merits of the appeal were not argued in view of the attitude of the court and no finding made in regard to the Commissioner's ruling.

The appeal is dismissed and the case is returned to the court *a quo* for hearing to a conclusion.

Craig and Harvey, Members, concurred.

For Appellant: Adv. W. O. H. Menge.

For Respondent: In default.

CENTRAL BANTU APPEAL COURT.

SIMON MONNAKGOTLA AND OTHERS
vs.
CATHARINA MONNAKGOTLA AND OTHERS.

CASE No. 8 OF 1967.

JOHANNESBURG: 8th September, 1967. Before Gold, President, Thorpe and Van Wezel, Members.

LAND.

Tribally owned land—tribesmen suing Chieftainess and other tribesmen—dispute over manner of occupation of land—Section 4 of Act No. 38 of 1927.

Summary: One section of a tribe sued another section, headed by the chieftainess, "in their personal individual capacities," for damages for the alleged illegal impounding of stock despastured on tribal land. The Bantu Affairs Commissioner ruled that no legal proceedings were competent in the absence of a certificate under section 4 of Act No. 38 of 1927 and dismissed the summons.

Held: That the dispute concerned the manner of occupation of land and that the term "occupation" in section 4 of Act No. 38 of 1927 included this concept.

Held: That a certificate under the said section 4 is required before any legal proceedings concerning such a dispute can be taken against a chieftainess, even if it is alleged that she is being sued in her personal individual capacity.

Held: That in the circumstances of this case a certificate under the said section 4 was a pre-requisite and that the appeal should be dismissed.

Legislation referred to:

Act No. 38 of 1927—Section 4.

Works referred to:

Steyn, "Die Uitleg van Wette," Third Edition, at page 23.

Cases referred to:

Mabe vs. Diole, 1 N.A.C. 31 (1950 C.D.).

Mosii vs. Motseoakhume, 1954 (3) S.A. 919 (A.D.).

R. vs. Ghoor and others, 1960 (3) S.A. 42.

Appeal from the Court of the Bantu Affairs Commissioner, Rustenburg.

Gold, President:—

In the Court below, plaintiffs (now appellants) issued summons against the six defendants (now respondents) one of whom was Catharina Monnakgotla, reading:—

"1. The Plaintiffs herein are Simon Monnakgotla, Alexander Mokgosi, Elisha Monnakgotla, Mark Monnakgotla, Albert Mabilikana, Hosila Moloko, Johannes Moloko, Daniel Motene, Samack Matophe, Lucas Monnakgotla, Kalev Moloko, Eva Sehube, D. Masiliko, Elizabeth Moloko, Retly Monnakgotla, David Moloko, Joseph Tlakane, Johannes Dibatana, Thomas Moerane, Simon Mathope, Bantu adults of Molotestad, Elandsfontein Farm, Boons.

2. The Defendants are Cathrine Monnakgotla, Isaac Mogome, Piet Nare, Albert Maseko, Obed Nkosi and Samuel Matsibe, Bantu adults whose full and further names and occupation are to Plaintiffs unknown of Molotestad, Elandsfontein Farm, Boons, sued jointly and severally the one paying the other to be absolved.

3. The Parties hereto are Bantus as defined in Act No. 38 of 1927.

4. On or about the 7th May 1963, Defendants wrongfully and unlawfully removed livestock, the property of the Plaintiffs from Elandsfontein Farm and impounded same.

5. As a result of the aforegoing the Plaintiffs have suffered damages in the sum of R186.

Wherefore Plaintiffs pray for Judgment against the Defendants, jointly and severally the one paying the other to be absolved for:—

(*a*) Payment of the sum of R186 as and for damages.

(*b*) Costs of suit.

(*c*) Other or alternative relief."

In reply to requests for further particulars, the plaintiffs stated that the defendants were sued in their personal individual capacities and that "the removal was wrongful and unlawful in that as heirs, successors and assigns of 'Kapitan Ratheo Monnakgotla en zijne Volk' in whose name the said farm was registered under Deed of Transfer No. 1578 of 1894, the Plaintiffs are entitled to the use of the said farm but Defendants removed Plaintiffs stock without legal justification". It was further stated that 250 head of cattle were removed.

The defendants pleaded to the merits and later filed a special plea, reading:—

> "The Defendants pleaded that in terms of section 4 of the Native Administration Act No. 38 of 1927 the above Honourable Court has no jurisdiction to try any legal proceedings in regard to the occupation of land instituted by members of the trobe without a written certificate issued by the Secretary of Native Affairs whereby approval for institution of such proceedings is granted to such members."

The Bantu Affairs Commisioner upheld the special plea and dismissed the summons. Appeal is brought to this Court on the ground that "the Court erred in upholding the Special Plea and its ruling that this Court had no jurisdiction in the matter without a Certificate in terms of section 4 of Act No. 38 of 1927."

The notice of appeal was filed timeously, but security for costs of appeal were lodged out of time. This Court was asked to condone the late lodging. Mr. Schabort, who appeared in this Court for respondents, left the application for condonation in the hands of the Court, which, because of the importance of the issues and the adequacy of the explanation for non-compliance with the Rules, granted it.

No point was made either in the Court below or before us of the fact that the special plea omitted what are, in my view, material averments, namely, that Catharina Monnakgotla is the chieftainess of the tribe of which appellants are members. In both Courts, argument proceeded on the basis that all parties are members of the same tribe of which Catharina Monnakgotla is the chieftainess and this Court must accept that that is the position.

In passing, it is pointed out that the Bantu Affairs Commissioner erred in relying on averments in the plea to the merits; such averments require to be proved. Section 4 of Act No. 38 of 1927, reads:—

> "No legal proceedings in regard to the ownership, occupation or acquisition of land by a native tribe shall be instituted or maintained against the chief of such tribe or against such tribe, or both, by an individual member or members of the tribe concerned unless such member or members produce a written certificate issued by the Secretary for Native Affairs, stating that the Governor-General (State President) has approved of the institution of such proceedings."

Mr. Vusani, who appeared in this Court for the appellants, argued that there was nothing on record to show that the proceedings concerned ownership, occupation or acquisition of land. The right to graze stock, he submitted, does not constitute occupation; it is merely an ancillary right. The plaintiffs' claim was not based on a right of occupation, but solely on delict. The fact that the chieftainess was one of the tortfeasors, he said, was quite incidental and had no connection with her status as as chieftainess.

Mr. Schabort conceded that in this case no question of ownership or acquisition of land is involved. He submitted, however, that the proceedings concern the occupation of tribal land.

Now, the words "occupy" and "occupation" are of uncertain meaning. There have been numerous decisions regarding their interpretation in the context of the statutes in which they appear. Mr. Schabort referred this Court to the case of *R. versus Ghoor and others,* 1960 (3) *S.A.* 42, in which most of those decisions were collected and reviewed.

It is not disputed that all the members of the tribe have the right to occupy tribal land. In the present case, one section of the tribe is claiming to exercise over the land rights which another section, headed by the chieftainess, obviously maintains it does not possess; otherwise the stock would not have been impounded.

The dispute therefore resolves itself into one, not of the right of occupation, as such, but of the manner in which that right is to be exercised or regulated by members of the tribe as a whole.

It follows that the Court must consider whether the words "proceedings in regard to the occupation of land" in section 4 of Act No. 38 of 1927 are to be interpreted as including proceedings in regard to the manner of occupation of the land. The rules of interpretation applicable are set out in Steyn's "Die Uitleg van Wette" (Third Edition) at page 23 where the learned author says—

> "Volgens *Hleka v. Johannesburg City Council,* 1949 (1) S.A. 842 (A) op b. 852, is dit by twyfel altyd veilig om te kyk na die rede waarom die wet aangeneem is. 'To arrive at the real meaning we have ..... to consider (1) what was the law before the measure was passed; (2) what was the mischief or defect for which the law had not provided; (3) what remedy the legislator had appointed; and (4) the reason for the remedy.' Die taak van die regter is dan altyd om die uitleg te volg wat die kwaad sal onderdruk en die middel daarteen sal bevorder.

> Veral waar woorde uitgelê moet word wat 'n wye onbepaalde betekenis het en juis daarom miskien deur die wetgewer gebruik is, is dit nodig om te let op die doel wat die wetgewer wil bereik: 'In construing such phrases, when they have no precise or exact meaning, the court must examine the scope and purpose of the law ..... and try and ascertain the true intent of the draughtsman of the legislature therefrom' (*Goldberg N. O. v. P. J. Joubert, Ltd.*, 1960 (1) S.A. 521 (T) op b. 523)".

The purpose of Section 4 is, it seems to me, to protect the chief and the tribe as a whole against vexatious or ill-advised litigation over tribal land by dissident elements of the tribe. Among the individual members comprising any tribe there must, in the nature of things, from time to time arise disputes as to how tribal land is to be used and how its occupation is to be regulated. There is little doubt, to my mind, that it was to prevent such disputes, *inter alia,* from unnecessarily forming the subject of the intra-tribal litigation that Section 4 was enacted. Indeed, any other circumstances in which members of a tribe would wish to institute proceedings against the chief in regard to the occupation of the land, by the tribe as a whole, are difficult to envisage.

The Court comes to the conclusion, therefore, that the word "occupation" in the context in which it is used in Section 4, includes in relation to tribal land, the manner of its occupation.

That being the case, the present proceedings are in regard to the occupation of tribal land.

The rights concerned in this action are not the rights of one person to a plot of tribal land allotted to him by tribal custom for his own use, as was the position in the cases of *Mosii versus Motseoakhumo* 1954 (3) *S.A.* 919 (*A.D.*) and *Mabe versus Diole* 1 *N.A.C.* 31 (1950 *C.D.*). Here the claim affects, at least, an extent of tribal land land sufficient for the depasturing of 250 head of cattle; it may affect all tribal land. Whatever the extent of land involved may be, however, it is clear that the proceedings concern its occupation by the tribe as a whole.

Once the conclusion has been reached that these proceedings are in regard to the occupation of tribal land, it makes no difference whether the chieftainess is sued as such or in her personal capacity or as a member of the tribe; a certificate under Section 4 of Act No. 38 of 1927 is a pre-requisite to the institution of the proceedings.

This Court agrees with Mr. Vusani's further submission that Section 4 must be restrictively interpreted, but the restriction cannot be carried to the point where the section loses all its effect. Where the circumstances are comprehensively hit by Section 4, as they are here, then the provisions of the section must be applied. The appellants are not remediless. It must be assumed that, if their grievance is well founded, the State President will approve of the institution of proceedings.

The appeal is dismissed, with costs.

Thorpe and Van Wezel, Members, concurred.

For Appellant: Mr. J. B. Vusani of J. B. Vusani & Co., Johannesburg.

For Respondent: Adv. P. J. Schabort, i.b. Deputy State Attorney, Johannesburg.

NORTH-EASTERN BANTU APPEAL COURT.

STEPHEN MGOZA vs. HARRY AND MEREDITH MGOZA.

B.A.C. CASE No. 40 OF 1966.

EJECTMENT.

The judgment in this case is published at 1966 *N.A.C.* 38.

At Pietermaritzburg on 5th December, 1966, the Court comprising Yates, President and Craig and Warner, members granted leave to the appellants to apply to the Appellate Division of the Supreme Court of South Africa for leave to appeal against the judgment of this court granted on 18th August, 1966, on the following points:—

(*a*) Whether or not the court erred in law in holding that the Plaintiff had a right to the property in question superior to that of the Defendants or any right at all; and

(*b*) Whether or not the court erred in law in holding that the Plaintiff had *locus standi* to sue in the matter.

The matter was argued before the Appellate Division on the 9th March, 1967, and judgment was reserved. On the 23rd March, 1967, the Appellate Division made the following order:—

> Leave to appeal is granted and the question whether or not the court *a quo* erred in holding that the respondent had *locus standing* to sue in this matter, is answered in the negative, with costs against the applicants.

The reader is referred to 1967 (2) S.A.L.R. at page 436 *et seqq* for the full text of the Appelate Division's judgment.

NORTH-EASTERN BANTU APPEAL COURT.

MIRRIAM MGENGE MABASO vs. JEREMIAH MABASO.

B.A.C. CASE No. 42 OF 1967.

Durban: 6th September, 1967. Before Yates, President and Craig and Harvey, Members of the Court.

BANTU LAW.

Declaration as heir—dispute—remedy—land—ownership—registration of title—ejectment.

Summary: Plaintiff and Defendant are mother and son. Plaintiff was declared by a Bantu Affairs Commissioner to be heir of her late husband and her title to certain landed property in the latter's estate was duly registered. She sought an order of ejectment against her son who occupied the property.

Held: That recourse must be had to the provisions of section 3 (3) of Government Notice No. 1664 of 1929, if appropriate, or to the substituted Government Notice No. R. 34 of 7th January, 1966, for a remedy if the correctness of the declaration as heir is to be assailed.

Held: That *omnia praesumuntur rite esse acta* applies and Plaintiff's title cannot be disturbed on the present papers.

Cases referred to:

Mzimela and others vs. Mzimela, 1960, N.A.C. 80.

Regulations referred to:

Government Notice No. 1664 of 1929, sections 3 (2) and (3).
Government Notice No. R. 34 of 1966.

Works referred to:

"Native Law in South Africa", 2nd edition by Seymour.

Appeal from the Court of the Bantu Affairs Commissioner, Pinetown.

Craig (Permanent Member):

This is an appeal against a judgment in favour of Plaintiff (now Respondent) an emancipated Bantu female, granting her an order of ejectment with costs against Defendant (now Appellant) from Stand 2023 in Clermont Township, District of Pinetown, Province of Natal.

Appeal is noted on the following grounds:—

"1. The Plaintiff failed to show that she was the lawful owner or the lawful possessor of the property in question.

2. The Plaintiff failed to show that the Defendant was in unlawful occupation of the said property.

3. The Plaintiff was not entitled to the ownership of the said property after the Defendant renounced his claim to the inheritance."

Shortly, the position is that Plaintiff and Defendant are mother and son respectively. The stand concerned was owned by Plaintiff's husband, Johannes, who died in 1946. It appears from the evidence and exhibits admitted that Plaintiff was declared on the 9th September, 1953, by the Bantu Affairs Commissioner, Pinetown, to be the heir according to Bantu Law and Custom, of the late Johannes and that on the 7th April, 1954, title to the stand concerned was registered in Plaintiff's name. Defendant has occupied the stand for some years but he and his mother are now at loggerheads and she has ordered him to quit and he has refused to do so.

Mr. Pitman confined his argument to two points, viz. (*a*) that Defendant is his father's heir under Bantu Law and Custom and (*b*) that under such system the appointment of a woman (Plaintiff) as heir is invalid and that in such circumstances the appeal should succeed. He quoted from Seymour's "Native Law in South Africa", 2nd edition, pages 175 *et seqq.*

The Court *a quo,* however, had no jurisdiction to adjudicate on the question of the validity of the declaration of Plaintiff as heir on the papers before it. Such declaration was made in terms of section 3 (2) of Government Notice No. 1664 of the 20th September, 1929 (since replaced without retrospective effect by Government Notice No. R. 34 of 7th January, 1966), and section 3 (3) makes provisions for dealing with such disputes and questions regarding such appointment as may arise, *vide Mzimela and others vs. Mzimela,* 1960, N.A.C. 80, in which Mr. Pitman appeared for the Appellant. It seems that Defendant's attorneys, for reasons best known to themselves, proposed to approach the Supreme Court on the question. Whether or not this approach was made within the time limit set by the court *a quo* on 17th January, 1967, is unknown.

In my view the Commissioner could give no other judgment than the one he did on the papers before him.

Plaintiff was, rightly or wrongly, appointed as heir to the property concerned and her title thereto has been duly registered by the Registrar of Deeds. The rule *omnia praesumuntur rite esse acta* applies and this court would not be justified in disturbing the judgment.

The appeal is dismissed with costs.

Yates, President and Harvey, Member, concurred.

For Appellant: Adv. A. S. K. Pitman i.b. R. Bugwandeen, Durban.

For Respondent: Adv. D. Noren i.b. McClung, Le Marchand, Goudge & Co., Pinetown.

NORTH-EASTERN BANTU APPEAL COURT.

SIMA KOK MOLOI vs. MATAPELO MOLOI.

B.A.C. CASE No. 57 OF 1967.

Pretoria: 25th October, 1967. Before Yates, President and Gafney and Welman, Members of the Court.

BANTU LAW.

Ejectment—guardian and ward—liability to maintain—system of law applicable—Stare decisis—*reasonable grounds for ejectment.*

Summary: Plaintiff inherited by will and received title to a certain piece of land from the mother of the female Defendant. He sought to eject Defendant because she had been disrespectful to him, had sold cattle the ownership of which was in dispute between them and had ploughed land without his consent. The Bantu Affairs Commissioner stated that he applied common law at the trial of the action.

Held: That under Bantu Law Plaintiff was bound to maintain Defendant.

Held: That in the circumstances of this case and also by virute of the *stare decisis rule* Defendant should be allowed a defence which was open to her under Bantu law and not under common law.

Held: That Plaintiff had not advanced good and sufficient reasons entitling him to eject Defendant.

Cases referred to:

Ex parte Minister of Native Affairs in *re.*

Yako vs. Beyi 1948 (1) S.A. 388 (A.D.).

Umvovo vs. Umvovo, 1953 (1) S.A. 195 (A.D.).

Mahashe vs. Mahashe, 1955, N.A.C. 149 (S).

Tonose vs. Tonose, 1936, N.A.C. (C. & O.) 103.

Duma d.a. vs. Swales, N.O. 1952, N.A.C. (N.E.) 272.

Zepe vs. Zepe, 1963, N.A.C. (S) 90.

Johannesburg City Council vs. Johannesburg Indian Sports Ground Association, 1964 (1) S.A. 678.

Works referred to:

" Native Law in South Africa " by Seymour, 2nd edition.

Yates (President):

This is an appeal from a judgment of a Bantu Affairs Commissioner's Court for Plaintiff (now Respondent) as prayed with costs in an action in which he sued his half-sister, Defendant (now Appellant), for ejectment from Portion No. 57 of the farm Daggakraal No. 90. situate in the District of Amersfoort. measuring 9 morgen and 9 square roods. Defendant in her plea as amended denied that Plaintiff was the owner of the ground and in the alternative stated that she was not on the ground unlawfully but in accordance with Bantu law and custom and was fully entitled to occupy it.

An appeal has been brought on the following grounds:—

" 1. Dat die Bantoekommissaris fouteer het deur die mening te huldig dat dit glad nie ter sake is of Eiser die voog is van Verweerderes aldan nie.

2. Dat die Bantoekommissaris fouteer het deur te bevind dat die kraal geleë op die eiendom in geskil nie ook 'n kraal is van die Eiser nie.

3. Dat die Bantoekommissaris fouteer het deur die mening te huldig dat die Eiser nie die Verweerderes uit sy kraal wil uitsit nie.

4. Dat die Eiser die voog is van die Verweerderes en verantwoordelik is vir die onderhou en versorging van haar en haar kinders en gevolglik nie geregtig is om haar en haar kinders van die kraal en/of perseel uit te sit nie.

5. Dat die Bantoekommissaris fouteer het deur die mening te huldig dat die enigste feite wat die hof moet beslis is of die Eiser die eienaar van die eiendom is en dat hy Verweerderes versoek het om die eiendom te ontruim en sy geweier en/of versuim het om dit te doen."

At the trial it was accepted that Plaintiff was the eldest living son in his late father's first house and Defendant was a daughter in the third house in which there were no males; and further that Plaintiff inherited the plot from the mother of Defendant who bequeathed it to him by will and that it was transferred into his name.

In his original reasons for judgment furnished at the request of Defendant's attorney the Commissioner held that because Plaintiff was the registered holder of the land he had the right to obtain an order for Defendant's ejectment as she had refused to vacate the property. It was only in his further reasons for judgment that he indicated unequivocally that he had applied the common law and not Bantu Law and Custom.

However, it is manifest from the plea and from the notes of the proceedings in court that Defendant based her defence on the contention that because Plaintiff was her guardian under Bantu Law and Custom he was responsible for the maintenance of herself and her six illegitimate children and therefore could not simply turn them off the property.

It is implicit in the notice of appeal too that the defence relied upon Bantu Law and Custom. The first question to be decided therefore is whether or not the Commissioner was correct in this decision. It is clear from the decisions in the cases *ex parte* Minister of Native Affairs in *re Yako vs. Beyi,* 1948 (1) S.A. 388 (A.D.) read with *Umvovo vs. Umvovo,* 1953 (1) S.A. 195 (A.D.) that a Bantu Affairs Commissioner has an unfettered discretion to apply the one system of law or the other, subject

only to two reservations viz. firstly that he exercises his discretion judicially and secondly, that he observes the *stare docisis* rule where it has already been decided what law must be applied in certain circumstances—see *Mahashe vs. Mahashe,* 1955, N.A.C. 149 (S.) at p. 154. Here Defendant's defence is based upon Bantu Law and if this is not applied she will be left without a remedy but while this is a factor to be taken into consideration in deciding which system of law to apply it is not the only one. The Commissioner based his decision to apply common law on the fact that Defendant's mother specifically left the property to Plaintiff by will and that if she had wished to make provision for her daughter she would have done so; but the inference that he makes is not necessarily true. She may well have bequeathed the property to Plaintiff, bearing Bantu custom in mind and that in accordance with that system of law he would necessarily be the general heir and the heir to her house in the absence of a male descendant, and responsible for the maintenance of the members of that house. That this is the correct inference is supported by the fact that Defendant and her children lived with her mother on the plot until the mother's death and that up to that stage, according to Plaintiff's evidence, there was no indication that Defendant's mother desired any change in the position. The bequest of the property to Plaintiff merely confirmed the inheritance which he was entitled to by custom. In the circumstances it is no more than just and equitable that in the present circumstances she should be allowed a defence open to her under that system of law and not under common law (vide Mahashe's case *supra.*).

In Bantu law a kraalhead must support his wife her children and the children of her unmarried daughters and on his death the whole burden falls on his heir (in the instant case, Plaintiff) —see Native Law in S.A. by Seymour, 2nd edition, at page 50 and pages 195/6, and the case of *Tonose vs. Tonose,* 1936, N.A.C. (C. & O.) 103 at p. 104. In considering what are the legal rights of Defendant and the obligations of the heir towards her and her children I cannot do better than to quote from the decision in the case of *Duma d.a. vs. Swales,* N.O. 1952, N.A.C. (N.E.) 272 at page 275: "All these authorities quoted postulate that although the heir becomes the owner of the property left by the deceased he cannot dispossess the widow (here read widow's unmarried daughter) of the right to be supported out of that property. In other words he must keep the property intact and may only dispose of so much to enable him to meet his obligations of support of the widow and child". The obligation may of course be met by the heir making other suitable arrangements for the support and maintenance of his Dependants [see *Zpe vs. Zepe,* 1963, N.A.C. (S.) 90 at p. 93 and the authorities there cited] but there has been no suggestion in the instant case that Plaintiff has made any move in this direction. Defendant and her mother lived on this property until the former's death in 1965 and Plaintiff took transfer in June, 1966. In January 1967 he issued a summons for the ejectment of Defendant. He admitted that in accordance with Bantu Law and Custom he was Defendant's guardian and that if there had been an heir in that house the property would have gone to the latter and been used for the support of that house. The only reasons he gave for wanting to turn her out were that she had been disrespectful and also that she had sold certain cattle which he claimed as his and had ploughed land without his consent. Defendant contended that the cattle were hers and that she had asked for permission to plough which had been refused and she had then simply re-ploughed the piece of land allotted to her by her mother for the support of her children Even if Plaintiff's version is accepted it does not in my view, constitute a good and sufficient reason for evicting Defendant and in any event he

would still be liable for the maintenance of the Defendant's children and no reason has been advanced why they should be evicted.

Mr. Harms also contended that Defendant's tenure of the land was a *precarium* in that during her mother's life-time she and her children had occupied the plot and had ploughed portion of the ground with her consent and after her death had continued to live there on the same terms. Plaintiff admitted in evidence that Defendant's mother had not wanted her to be dispossessed. Mr. Harms conceded that should the owner give notice to Defendant to vacate the property she would be bound to do so but contended that this would be subject to the proviso that the grounds for terminating her tenure must not be unreasonable—see *Johannesburg City Council vs. Johannesburg Indian Sports Ground Association,* 1964 (1) S.A. 678 at page 683/4. Here Defendant's mother clearly meant Defendant to remain on the property and the latter can only be evicted if reasonable steps are taken for the subsequent maintenance of herself and her children. Plaintiff has other ground and he lives on church property. He cannot divest himself of his obligations to support his Dependants. Failing good and sufficient reasons, therefore, for terminatiing Defendant's tenure he is not entitled to an order of ejectment.

The appeal therefore is allowed with costs and the Commissioner's judgment altered to one dismissing the summons with costs, which is what Defendant asked for in her plea.

Gafney and Welman, Members, concurred.

NORTH-EASTERN BANTU APPEAL COURT.

FREDIE ZUNGU vs. MPUMANGINGENE MTSHALI.

B.A.C. CASE No. 58 OF 1967.

ESHOWE: 17th November, 1967. Before Yates, President, and Craig and Colenbrander, Members.

PRACTICE AND PROCEDURE.

Default judgment in Chief's court—appealability—procedure.

Summary: The question was raised whether an appeal in respect of a default judgment in a Chief's court where that court had refused rescission should be directed at the refusal to rescind or at the judgment itself and this court was asked to give a ruling on the point.

Held: That subject to compliance with Bantu Chiefs' Courts Rules 2 and 9 (the latter rule having been amended by the insertion of a proviso vide Government Notice No. 886 of 1958), an appeal against the default judgment itself is competent.

Cases referred to:

Mchunu vs. Mchunu, 1955, N.A.C. (N.E.) 72.

Rules referred to:

Bantu Chief's Courts Rules 2 and 9.

Appeal from the Court of the Bantu Affairs Commissioner, Hlabisa at Mtubutuba.

The merits of the appeal are not important to this report and will be omitted.

Craig (Permanent Member):

Mr. Brien suggested that as the point of whether or not the proper course had been followed in the matter of the appeal from the Chief's court had not been raised as a ground of appeal *vide supra* this court should, *mero motu,* raise the point in the light of the decision in the case of *Mchunu vs. Mchunu,* 1955 N.A.C. 72, where it was held: "That the correct procedure for the Defendant to have followed was, in terms of section 2 (3) of the Chiefs' Courts' Rules, to have asked the Chief to rescind his default judgment and if his application were refused, to have appealed against that refusal to the Bantu Affairs Commissioner's Court". It is clear from an affidavit dated 8th October, 1966, by Defendant that the Chief had been approached for a rescission of the default judgment granted by his court but had refused to rescind it.

Mchunu's case was, however, decided some 3 years before the proviso to Chiefs' Courts' Rule 9 was added by Government Notice No. 886 of 1958. This proviso is "that no appeal shall lie from a default judgment given by a Chief under subsection (1) of section two unless and until an application for the rescission of such judgment has been refused". Mr. White suggested that the proviso had been inserted because of the decision in Mchunu's case, *supra.*

An appeal against the default judgment itself is, therefore, competent when there has been compliance with Rule 9 as amended by Government Notice No. 886 of 1958 and with Chiefs' Courts' Rule No. 2.

Subsection (5) of Rule 2, *supra* requires a Chief to report a rescission of a default judgment to the Clerk of Court for the purpose of having it recorded. There is no like provision to cover the case of a refusal to rescind but there appears to be no reason why a Chief should not be caused, administratively or by judicial process, to appear to state whether or not he has refused to rescind—see the cases of *Mdlalose vs. Sikakane,* 1959, N.A.C. 67 (N.E.) and *Tabota vs. Sidinana,* 1962, N.A.C. 5 (S.) regarding testimony by Chiefs in regard to cases heard in their courts.

Yates, President, and Colenbrander, Members, concurred.

For Appellant: Mr. S. H. Brien, Eshowe.

For Respondent: Mr. W. E. White, Eshowe.

For Appellant: Adv. L. T. C. Harms.

For Respondent: In default.

NORTH-EASTERN BANTU APPEAL COURT.

MTHWALO VINCENT KHUMALO
vs.
GERTRUDE KHUMALO D.A. AND ANOTHER.

B.A.C. CASE No. 59 OF 1967.

ESHOWE: 17th November, 1967, before Yates, President and Craig and Colenbrander, Members of the Court.

BANTU LAW.

Customary union—dissolution—desertion—considerations which might move court to grant divorce on other grounds not pleaded.

The reader is referred to the full text of the judgment below.

Cases referred to:

Mkize vs. Mkize, 1941, N.A.C. 125 (N. & T.).

Laws referred to:

Natal Bantu Code 74 (*f*), 76 (1) (*a*) and (*f*).

Works referred to:

"Principles of Native Law and the Natal Code" by Stafford and Franklin.

Yates (President):

This is an appeal from a judgment of a Bantu Affairs Commissioner's Court for Defendants (now Respondents) with costs in an action in which Plaintiff (now Appellant) sued Defendant No. 1 for an order of dissolution of his customary union with her and custody of the two minor children and Defendant No. 2 for the return of eight head of lobolo cattle alleging in his particulars of claim that during November 1964 his wife had deserted him and although attempts had been made to reconcile the parties the desertion continued. He also alleged that he had paid 11 head of cattle as lobolo.

Defendants denied the desertion.

An appeal has now been brought on the grounds that:—

"1. The Bantu Affairs Commissioner erred in his finding of fact that Appellant's wife left Appellant's kraal because she had been accused of witchcraft by Appellant, there having been insufficient evidence to justify such a finding.

2. Although adultery was not relied on by Appellant as a ground of divorce, on a true construction of the evidence, this was the real reason for Respondent's desertion of Appellant, and the Bantu Affairs Commissioner ought to have found such to be a fact.

The Bantu Affairs Commissioner erred in his finding that desertion is not the real reason why the parties separated."

The Commissioner, according to his reasons for judgment, found that Defendant No. 1 left the kraal of her husband because she had been accused of witchcraft and based his conclusion on the fact that she stated in her evidence that her husband had said that she had killed his 1st wife and a statement by Plaintiff at the very end of his evidence that he did not now want his wife back as he was now afraid of her. Defendant No. 2 also stated that this accusation was one of the reasons she gave for returning home.

Plaintiff, however, stated that there had been trouble before his first wife died and that thereafter Defendant No. 1 had refused to wash his clothes but had washed the clothes of another man and that when he had asked for an explanation she left the following day. He went to fetch her but she did not return for a week and when she did come back she asked for forgiveness as she admitted she had committed adultery. He thereupon informed her that he would forgive her if she made a confession to her people, which she did, but she never returned to his kraal. The only other evidence in regard to adultery was

the evidence of an induna, Siffo, who stated that at an enquiry, where Plaintiff alleged that his wife had committed adultery she admitted it and asked for forgiveness. Defendant No. 2's version of this incident however is that Defendant No. 1 was accused of adultery but she was not asked to deny it and kept quiet.

Whatever the position may be in this regard, as pointed out by the Commissioner, the Plaintiff in his summons did not allege adultery as a reason for divorce but desertion and in order to succeed he must not only prove the separation but that it took place with the manifest intention of not resuming marital relations—see "Principles of Native Law and the Natal Code" by Stafford and Franklin at page 129 and the authorities there cited.

In his evidence the chief Plaintff stated that Defendant No. 1 did not return to his kraal even though after an enquiry the chief had ordered her to do so. However, in reply to questions by Defendant No. 1 he admitted that she had been brought back by her father who tendered a fine to him which he refused because "she admitted she had another man". In reply to Defendant No. 2 he also stated that he had refused to take his wife back "as I would bring the matter to the Bantu Affairs Commissioner because it was not clear".

It is quite clear too from the evidence of Defendant No. 1 and her father that she did attempt to return to Plaintiff who refused to have her back. She has also stated that she was prepared to return to him at any time. It is evident therefore that Plaintiff's conduct is the proximate reason why marital relations have not been resumed.

Mr. White contended that even though desertion by Defendant had not been established there was sufficient evidence in the record to show that conditions were such as to render continuous living together insupportable and that on the authority of the case of *Mkize vs. Mkize*, 1941, N.A.C. 125 (N. & T.) the appeal should be allowed and the divorce granted. In that case although the ground for claiming the divorce was desertion by the wife, which the Commissioner found had not been proved, yet he granted the divorce and the appeal court held that as the conditions were such as to make living together insupportable the court *might* grant a divorce [*vide* section 74 (*f*) of the Code].

In the instant case the Commissioner did not grant a divorce which was claimed solely on the grounds of the wife's desertion and this court cannot say that his decision was wrong.

Had dissolution been asked for on the grounds set out in section 76 (1) (*a*) and (*f*) of the Natal Code his decision might well have been different.

In the result the appeal is dismissed with costs.

Craig and Colenbrander, Members, concurred.

For Appellant: Mr. W. E. White, Eshowe.

For Respondents: In person.

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